By Mr. Boland:

Q. Did you communicate the results of your con-
1553 versation to Wilhelm von Opel? A. Yes, just in this letter of July 7, 1937.

Q. And the purpose of this letter of July 7, 1937, is what, Doctor? A. This letter had, in the light of my assignment and in the light of my situation, the extremely important purpose of putting on paper the approval of the Reichsbank of my legal position.

Q. And did you forward a copy of this letter to Wilhelm von Opel? A. Yes, sir; this letter was found in his files.

Mr. Boland: I offer Exhibits 98, 99, 100, and 101.

(The documents referred to were thereupon received in evidence as Plaintiff's Exhibits 98, 99, 100, and 101.)

By Mr. Boland:

Q. I show you now a paper identified as Defendant's Exhibit 32 and ask whether you are able to identify this document? A. Yes; this is a copy authenticated by the authorities, of the last will of Wilhelm and Martha von Opel.

Q. Do you know who drafted this will, Doctor? A. Yes. I drafted it, except for the codicils which were added subsequently.

Q. And what was the date on which you drafted
1554 this will, Doctor? A. The date was November 20, 1938, as I note from the copy of the will. I directly remember it was in October or November of 1938, because at that time I was present at the hunting lodge at Wilhelmsruhe, on the Lake of Moener.

Q. And who was present at the time the will was drafted? A. Wilhelm von Opel, Marta von Opel, Fritz von Opel, and I myself.

Q. At the time of the drafting of the will, was there any conversation in connection with the gift agreement of October 5, 1931? A. Yes, sir, for the reason that in connection with this gift agreement steps had to be taken with respect to the accounting as between son and daughter.

Q. Were there any conversations in connection with the rights of Marta or Wilhelm von Opel under the Niessbrauch? A. No.

Q. Doctor, do you know an Erich Deku? A. Yes, sir.

Q. Do you know a Rudolf Deku? A. Also.

Q. Do you know a Graf Schwerin? A. Likewise.

1555 Q. Do you know a Major Mudra? A. Likewise.

Q. Doctor, Rudolph Deku testified here the other day in this case, and he testified as a witness for the defendants. He stated that he had had dinner but once in his life with Wilhelm von Opel. He stated further, in cross examination, that you were not present at that dinner.

Do you ever recall having had dinner with Wilhelm von Opel at a time at which Rudolf Deku was present? A. Yes, sir, in the Neva Grill in Berlin.

Q. And in what year did this dinner take place? A. It must have been in the year 1934.

Q. Do you remember who was present at that dinner? A. All those persons that were mentioned before as being known to me, and in addition myself, and Wilhelm von Opel.

Q. In other words, you mean that Erich Deku, Rudolf Deku, Graf Schwerin, Major Mudra, Wilhelm von Opel, and yourself were present? A. That is correct.

Q. How do you remember this dinner, Doctor? A. Mainly for the reason that I never attended another dinner with the same guest list, and also for the reason that I didn't attend another dinner at the Neva Grill.

Q. What was the nature of the conversation during the course of the dinner, Doctor? A. I have no imme-

1556 diate recollection of the conversation, and I assume that it slipped my memory, as thousands of others, because nothing worthwhile was being said.

Q. Doctor, Rudolf Deku stated, at page 844 of the record, in answer to the following question by Mr. Baum:

"Now, Mr. Deku, will you please tell us in words or substance what you recall was said by Mr. Wilhelm von Opel during the course of this dinner?"

Which answer Mr. Rudolf Deku stated as follows:

"As a result of my questions, and as a result of the questions of the others, the discussion arose over the payment of a fine of three and a half million marks by Wilhelm von Opel.

"We were astonished that he had submitted to such a severe fine, without fighting through a regular procedure.

"And we asked him how it came about, how he happened to do that.

"He stated that it was well worth three and a half million marks to have his assets outside of the German locked safe."

Now, Doctor, do you remember Wilhelm von Opel's having made these statements during the course of that dinner? A. No; I do not remember that. But I would
1557 like to add that if such a statement had been made by Wilhelm von Opel, it would have fixed itself upon my memory.

Q. Referring to page 842 of the record, in referring to a trip which you took to Switzerland, Mr. Deku stated the following:

"Mr. Gros was evidently dissatisfied with the results of his conversation with Fritz von Opel, and he stated that in his opinion it would be difficult for Wilhelm von Opel to prove to the German authorities the bona fide character of the agreement which he had concluded."

The question is, did you ever make that statement to Mr. Rudolf Deku? A. It is wholly impossible that I made such a statement, because it is in direct conflict with the

basic position which I have always taken in this matter; and, in fact, I advised at this time not to submit but to go to court in connection with it.

Q. Doctor, was your deposition ever taken in connection with this case? A. Yes, sir, in September of last year in Wiesbaden.

Q. Wiesbaden, Germany? A. Yes, sir.

Q. And were the documents which you identified here today presented as exhibits during the course of that deposition?

1558 Mr. Burling: I object, Your Honor, on the ground that it is irrelevant.

The Court (to counsel for plaintiff): What is the point?

Mr. Boland: The point of this, Your Honor, is to establish that during the course of the deposition taken of Mr. Gros by Mr. Baum and Mr. Laufer, in Wiesbaden, Germany, at which time the very documents we have here in this court that this man has identified today were put in evidence and questions asked about them, that during the course of his deposition Wilhelm von Opel was sitting right next to him, and if they had any questions to ask about the waiver, they could have asked them then and there. And we think it is very material to get that in evidence.

Mr. Burling: I object very strongly, if Your Honor please. If the testimony is that Wilhelm von Opel waived something, and Wilhelm von Opel's deposition indicates the proper party to testify about the waiver is Wilhelm von Opel, I think it is argumentative, to which we could respond at the proper time, that it is not the proper thing to think up this waiver story after Wilhelm von Opel is dead.

Mr. Boland: They were there, Your Honor. Wilhelm von Opel was there during the course of this deposition about the waiver.

1559 The Court: And you want to draw some inference from the fact that they didn't question him about it?

Mr. Boland: I want to counteract any inferences they are drawing about the fact that there is no questioning of Wilhelm von Opel about the waiver.

Mr. Burling: We agree Wilhelm von Opel was sitting there. But when they came to taking the deposition of Wilhelm von Opel, they forgot to ask him any question about waiver.

Mr. Boland: We will stipulate that at the time the deposition was taken of Dr. Gros, the documents he has identified today were identified in the course of the deposition, and during the course of his deposition Mr. Baum and Mr. Laufer were present; and, further, that Wilhelm von Opel was present during the course of the deposition.

Mr. Burling: I will stipulate if you will join in the stipulation that neither Maria von Opel nor Wilhelm von Opel was asked a single word about waiver, when their deposition was taken.

Mr. Boland: You can make your argument for the record on that. We won't stipulate on that.

The Court: Well, you stipulate the facts as to the presence of the parties, and the presence of the documents, and the conclusions can be drawn later on.

Mr. Burling: All right, sir.

1560 Mr. Boland: Yes, sir. With that understanding, Your Honor, that is all we have on direct.

Cross Examination

By Mr. Burling:

Q. As closely as you can fix the date, when was this dinner you have testified to at the Neva Grill? A. From immediate memory I cannot fix the date any further. It was an important prop to my memory that Rudolf Deku fixed the date.

Q. Now, Dr. Gros, this is a very complicated cross examination that I have to conduct, and I request you to answer

my questions as directly as possible, and not volunteer or make arguments or make comments about the reason for your answers. A. Does that refer to the last answer which I have given?

Q. Yes; I want the best date you can possibly give, and nothing else. A. I believe to be required to add this in order to make a truthful statement; otherwise my answer would have given rise to misunderstanding.

Q. You are required, on the contrary, to answer my questions and say nothing else at this time.

Mr. Boland: Your Honor, I think that the witness has indicated he doesn't recollect this, because Rudolf
1561 Deku was the one who fixed the thing in his memory, and he doesn't remember specifically, and I don't see how a man can be required to do that which he cannot do.

Mr. Burling: Then he can say it; but I don't want argument which can go on for days.

The Court: I think he has the point now, and let us see how we can go on.

By Mr. Burling:

Q. Give us the best statement you can as to when the dinner at the Neva Grill took place. A. I canot make a further statement—a more definite statement.

Q. Did it take place between 1920 and 1940? A. I already stated it took place in the year 1934.

Q. Did it take place in the summer of 1934? A. If I examine my conscience closely I must say that any more definite statement as to the time would divorce me from the truth.

Q. Well, we certainly don't want to do that, Doctor.

Mr. Boland: We agree.

The Witness: I take that for granted.

By Mr. Burling:

Q. Do you not recall that the dinner at the Neva Grill took place shortly after a summary judgment had been entered in the Wilhelm von Opel proceedings? A.
1562 I have no recollection of the fact that there was any connection between the summary order and the date of this dinner.

Q. How many times have you been in the Newa
1563 Grill? A. As I stated already, I have been there only once, and it was on the occasion of that dinner.

Q. And is it not true that the Newa in the 1930's was the most fashionable, or one of the most fashionable restaurants in Berlin? A. I don't know whether you can put it that way. At any rate, is was a rather small establishment.

Q. It was a very expensive restaurant, was it not? A. It belonged to the group of the more expensive establishments. I did not then, and am not now, familiar with the very expensive restaurants.

Q. And the dinner took place in a private dining room, did it not? A. I cannot remember that any more.

Q. And you were invited to this dinner by Wilhelm von Opel, were you not? A. How it happened that I was present at the dinner, I cannot state any more today.

Q. Don't you recall it was a dinner in the nature of a celebration given by Wilhelm von Opel? A. No—celebration, what for?

Q. For the success in getting his money out of Germany. A. No, during this time I have only seen him complaining bitterly about the fact that he was pressured by
1564 the German agencies.

Q. In 1935, I believe you testified you were retained by Wilhelm von Opel in relation to a usufruct matter? A. Yes, that is correct.

Q. And you are familiar, are you not, with the applicable law in Germany relating to usufructs? A. Yes, at

that time I was quite familiar with all the details of these provisions, and even today I am familiar with the basic principles thereof.

Q. And it is true, is it not, that a usufruct, as opposed to a claim to have someone create a usufruct, is an in rem right? A. No, that is not correct, because the term "usufruct" is used even by lawyers in different meanings.

Q. I am going to show you the German civil code, and ask you to point out any chapter relating to a usufruct other than a right in rem. A. I assume that this is not seriously meant, because otherwise it would take too much time.

Q. I assure you, Doctor, it is seriously meant, because I am advised by my experts that there is no such reference in the code anywhere, and I ask you to point one out to me. if there is one. A. In order to do this properly, I will just as a matter of precaution check up in the index.

1565 Mr. Boland: Your Honor, while he is checking, I don't want the record to indicate that because he may or may not find something in the German code that the position of the plaintiff is unwarranted, or the position of the defendant in this case. He is not qualified in German law.

Mr. Burling: Your Honor, I am merely laying a foundation for attacking the testimony of this witness with respect to the termination of the usufruct. I am not trying to make him a general expert. I am merely laying a foundation for an attack on his testimony relating to the termination of the usufruct, which we contend never was terminated at all, if it ever came into existence; that is, if this was not a sham transaction from the outset.

Mr. Gallagher: Could you clarify that? You mean it was not terminated because it did not receive the approval of the Germans?

Mr. Burling: No, no, my contention, which I am coming to, is that it was impossible validly to waive a usufruct or

even a claim for a usufruct once it was created, without a license, and a license was never issued, or at least, there is no testimony from Mr. von Opel that a license was issued.

The Witness: May I hear the question again?

(The pending question was read by the reporter.)

The Witness: No, I think I must agree with you that the usufruct in a technical sense appears only as a right
1566 in rem in this code.

By Mr. Burling:

Q. And that is the code in which the German civil law is embodied, is it not? A. Yes, since 1900.

Q. Now, Doctor, what are the conditions required to create a valid usufruct? A. In order to avoid misunderstandings, shall I take the word "usufruct" to mean a right in rem?

Q. Yes, as defined in the code. A. The requirements are basically the same as those required for the creation of any other right in rem, that is, a meeting of the minds and delivery, or, in the place of delivery, a substitute for such delivery.

Q. And once there is an agreement that a usufruct is to be created, then all that is left undone is the delivery of possession to the usufructuary, is that right? A. That is correct, if the question is put in an abstract fashion, because otherwise the particular circumstances must be taken into consideration.

Q. Suppose we take these hypothetical circumstances. "A" gives legal title to property to "B", and it is agreed that "A" is to keep the usufruct, and "B" takes the property and sells it, and puts the proceeds in a safe deposit box, and delivers the key to that box to "C". And
1567 "A" and "C" have agreed that "C" is the agent of "A", and "B" gives the key to "C", and at that time

"C" agrees to hold the key in his capacity as "A's" agent.

Under those circumstances, the delivery of the key would constitute good delivery to the usufructuary, and a valid usufruct would arise, is that not so? A. I must state that my intellectual capacity didn't quite catch up with the hypotheses presented to me, and therefore I would like to put them down again.

Q. Isn't this pure sham, Doctor, aren't you just acting? A. I don't know how I gave cause for such a statement on your part, and I reject it.

Q. Haven't you been dealing with precisely the hypothesis I put to you in this very matter ever since 1935? A. Not so.

Q. Don't you know that Fritz von Opel swore in 1935 that he put the shares of Uebersee in a box, and took the box and gave the key to the box to Hans Frankenberg as his father's agent?

Mr. Gallagher: Your Honor, I will have to object. The testimony of Mr. von Opel is not to that effect. The record reflects that Mr. von Opel gave him a key, and subsequently, the following year, asked him to be the agent. You constantly, Mr. Burling, change the record in that respect.

Mr. Burling: May I state to Your Honor that Mr.
1568 Gallagher has made an unwarranted assertion, that my question is entirely correct, that the affidavit of Fritz von Opel says in the most clear possible language that he gave the key to Hans Frankenberg as agent for his father.

The Court: There is no use of arguing about it. He is asking the question as to whether this witness recalls that as a fact. If that's the wrong hypothesis, you can bring it out later on.

He asked him if he doesn't recall that was the fact.

Mr. Burling: I asked him if he didn't recall that Fritz von Opel swore to that?

Mr. Gallagher: Just for the purpose of the record, Your

Honor, even the affidavit itself, which I submit should be read on this point, was not given to him for that purpose, but said it was held for that purpose. The key was held by—

The Court: Let us not waste too much on this. What he is trying to develop is whether the witness knows what he is talking about. Let us not spend too much time on it. I am going to let you argue the significance of the testimony at the proper time. What you are trying to establish is that he is familiar with the hypothesis.

Mr. Burling: That is correct, Your Honor.

The Witness: I learned about this in the course of this proceeding.

By Mr. Burling:

Q. Don't you understand my hypothesis? Don't
1569 you understand that in my hypothesis Wilhelm is "A", Fritz is "B", and Frankenberg is "C"? A. I have made notations so that I will better understand it, and I request you to continue.

Q. All right, my question is, on the hypothesis I gave you, the fact that "C" holds the key as agent for "A" would be a good delivery to "A" for the purpose of creating a usufruct. A. In this abstract fashion of putting the question, nothing reliable can be stated.

Q. Well, will you answer the question? A. It is impossible to answer the question.

Mr. Gallagher: Mr. Burling, I suggest you now state the hypothesis, so he can write it down. I think it will save time. I think he has forgotten the hypothesis.

Mr. Burling: All right.

By Mr. Burling:

Q. The hypothesis, once more, is: "A" gives legal title of property to "B", and "A" and "B" agree that "A" is

to retain the usufruct. And "B" places the property given in a safe deposit box. And "A" and "C" agree that "C" shall act as the agent of "A". And "C" then holds the key to the safe deposit box as agent for "A", having previously been given the key by "B".

And "B" and "C" agree that "C" is to hold the key as agent for "A". A. From the many assumptions
1570 that were made I can see that an agreement of the parties is present, and also something that can be described as a delivery or substitute for delivery, which would bring a usufruct into being, in an abstract fashion.

Q. But nevertheless valid?

Mr. Gallagher: I just want to ask one question. That hypothesis, if I recollect correctly, stated that "A" and "C" had agreed, "A" being the father, and "C" being Frankenberg, is that correct?

Mr. Burling: Yes, you heard correctly.

The Court: But nevertheless valid, he asked.

The Witness: Certainly.

By Mr. Burling:

Q. Once a usufruct is established under German law, it can be terminated, can it not, by the act of the usufructuary? A. Certainly, the niessbrauch can be terminated.

Q. And by the act of the usufructuary? A. I believe if the whole thing is to be waived, a consent of the other parties is required.

Q. And when a usufruct is waived, and the title holder agrees, then the beneficial interest in the property passes to the title holder, is that right? A. I do not understand that.

Q. Well, supposing that I have the usufructuary
1571 interest in a thousand hectare farm; as long as I have the usufruct, I get all the crops that grow on that farm, don't I? A. Yes.

Q. And if you held the legal title, you wouldn't get the crops until the usufruct was over, would you? A. Certainly.

Q. And if I waive my usufructuary interest, and you consent to it, my right to the crops moves to you immediately, does it not? A. You cannot put it in those terms under German law, but in substance that is the case.

Q. And so a waiver of a niessbrauch or usufruct is a disposition of a property right, isn't it? A. Yes, because the term "niessbrauch" itself is a right in rem as we use the term at the present time.

Q. Is it not true that under German law after August 1, 1931, a disposition of a right or claim for foreign exchange could not be made without a license from the Reich foreign exchange control office? A. I do not know whether you can put it in that fashion, I would have to know what technical term the law uses in order to give an answer to that.

Q. Didn't you ever look up the law on this point? A. Certainly, at the time when I handled the matter,
1572 I knew it in my memory, but I am not a peripatetic library.

Q. Fortunately, we have a library here, Doctor.

Mr. Burling: (To the clerk) May I have defendant's 31, please?

The Clerk: That I don't think has ever been entered, that is the Reichsgesetzblatt. That was marked for identification. I don't think it ever came into my exhibits. I have it so marked, as marking for identification.

By Mr. Burling:

Q. I show you a photostatic copy of Pages 421 to 425 of the Reichsgesetzblatt for August 1, 1931. This is another copy of defendant's 31.

Mr. Boland: Is this the currency laws?

Mr. Burling: Yes.

Mr. Boland: No objection.

By Mr. Burling:

Q. Will you look at section 12? What does that provide with respect to foreign exchange transactions? A. It is provided that transactions which violate the provisions of sections 3 to 11 are void.

Q. Will you look at sections 3 and 4, and see what transactions are dealt with. Rather, Doctor, will you look at paragraph 3, and see if my translation is correct?

"Foreign currency, or claims payable in foreign currency
which have been acquired otherwise than in accord-
1573 ance with section 2 may be transferred only under
a license in writing of the Office of Foreign Control, except where such assets are sold to the Reichsbank, or one of the banks provided for in Section 2, Paragraph 3.

"4. Foreign securities not listed on a German stock exchange may not be acquired for a consideration except under a license in writing of the Office of Foreign Exchange Control. Foreign securities not listed on a foreign stock exchange may be transferred only under a license in writing of the Foreign Exchange Control, except where the securities are sold to the Reichsbank or one of the banks provided for in Section 2, Paragraph 3."

Is that correct? A. Yes.

Q. In the light of this proclamation, could a usufruct validly created in foreign securities be waived without a license? A. Section 3 refers to foreign means of payment or claims; Section 4 to securities. If the law is construed literally, then it must be stated that a niessbrauch is not included in these provisions, for it quite evidently is neither a foreign means of payment, nor a claim, nor a foreign security. The niessbrauch is a right in rem from which possibly such foreign securities, claims of foreign currency, may accrue.

1575 If they so accrue, then of course they constitute foreign claims, foreign means of payment, and securities which are included in Sections 3 or 4.

Q. On the hypothesis that you have a usufruct presently in foreign securities, was it not necessary to have a license in order validly to waive the usufruct? A. I have in my legal memoranda taken the position because of the highly personal nature of the usufruct, such a license was not required, but I would like to add that one could be of a different opinion, if one does not construe the provisions literally, but keeps in mind the economic purpose of the law, and wants to include the economic consequences resulting from such transactions.

The Court: Mr. Burling, you will be some time longer, won't you?

Mr. Burling: I am afraid so.

The Court: As I told you yesterday, I had to make an appointment yesterday. I will have to adjourn at this time. We will go until ten o'clock tomorrow morning.

(Accordingly, at 3:45 p. m. the trial was adjourned until 10 o'clock the following morning, Thursday, December 23, 1948.)

* * * * *

PROCEEDINGS

1579 Mr. Burling: Your Honor, may the record show that I have furnished plaintiffs with all of the statements or papers other than my own trial brief which we have, relating to Mason Houghland, except FBI reports.

Mr. Gallagher: We acknowledge the receipt of those from Mr. Burling, Your Honor.

The Court: All right.

Whereupon, Dr. Daniel Gros, returned to the witness stand and was examined and testified further, through the interpreter, Mr. Joseph Laufer, as follows:

Cross Examination (Resumed)

By Mr. Burling:

Q. Dr. Gros, I am going to ask you to look once more at Section 4 of the report of the Reich President of August 1, 1931. Will you look, please, at the second sentence of that paragraph? I want you to look particularly at the verb in that sentence, and I want you to look at the verbal phrase; that is, there is a verb modified by a preposition. And the first word of the verbal phrase is the German word "uber", is it not? A. Yes.

Q. Then the next word in the verbal phrase is the
1580 word "darf"? Is that right? A. Yes.

Q. And the next word is "werden", is it not? A. Yes.

Q. We skipped the word "verfugt", did we not? A. Yes.

Q. And the verb is modified by the word "nur"? Is that right? A. Yes.

Q. And the infinitive of the actual verb used is "verfugen"? Is that right? A. Yes.

Q. And "uber" is a preposition that customarily goes with the verb "verfugen"? Is that right? A. Yes.

Q. And the term "verfugen uber" is a technical term of the German civil law, is it not? A. Yes.

Q. And the noun form of the word "verfugen" is "verfugung"? Is that correct? A. And when used in the Civil Code, it means a declaration of intention which results directly in the loss of a right or a change in a right by which the right is encumbered?—in other words, a legal transaction by which a right is directly transferred, encumbered, changed in its substance, or terminated?
1581 Is that correct? A. Yes, that is correct. The emphasis is on the word "immediate" or "direct".

Q. And it would include, would it not, one, transfer of ownership or of an existing pledge, or assignment of a claim? A. Yes.

Q. And another transaction which would be a verfugung would be a creation of a right in rem in a given property? A. That is also a verfugung.

Q. And another class of transactions which is classified as verfugung are waivers of rights? Is that correct? A. Yes.

Q. Are you familiar with a volume entitled "Treatise on Civil Law", by Enneccerus-Nipperdey? A. Yes.

Q. I will show you a section entitled "Waiver", which is a subsection to a section called "Particularly Important Verfugungen", and ask you if you will state how the authors of this treatise define "waiver".

Will you just read, please, the definition of "waiver" which I handed you? A. On page 429, under 3, it is stated as follows:

"A 'waiver' in the larger sense of the word is the surrender of a legal advantage by a declaration of in-
1583 tent directed toward that end."

That is the first sentence. It is stated there further:

"This legal advantage may be a right or may arise without such a right, from a rule of law which operates in favor of somebody, in particular a rule of the law of procedure.

"Since however, the waiver of rights is of importance almost exclusively for private law, and moreover can be substantially distinguished from the other kinds of waivers, it is recommended to define the surrender of a right by declaration of intent as a waiver in the narrow sense of the term"—and so on.

"The waiver of"—

Q. Just a moment, Doctor. You said "and so on", did you not? A. No. I have also read the next sentence.

Q. Well, you did use the words "and so on", did you not? A. That is correct. But after I had read the next following sentence.

Mr. Burling: Then I will ask the interpreter to read the next sentence.

The Interpreter: I read it already.

Mr. Burling: Will you translate it?

The Interpreter: "No waiver is presented by the
1583 mere non-acquisition of a right, if thereby a right of expectancy is not surrendered thereby"—and so on.

By Mr. Burling:

Q. Will you look again at Section 4 of the Executive Order of August 1, 1931, and state whether or not it is not clear to you that the waiver of a valid usufruct in foreign securities was a transaction within the meaning of that section? A. I believe to remember to have stated already yesterday that I am of the opinion that a waiver of a usufruct does not constitute a verfugung within the terms of this section, because by such a waiver, income which is pertinent to the terms of the Foreign Exchange Control is not affected directly or immediately, but indirectly.

And I have also stated this position in my applications to an agency, although I am willing to admit that another interpretation is possible, if one does not keep in mind the direct legal language, but the economic consequences and results.

Q. By the way, this textbook I showed you is a standard German commentary on the civil law, is it not? A. By all means, yes.

Q. And you agree with what it says about verfugung, do you not? A. Yes.

1584 Q. And you agree with what it said here about waivers, do you not? A. Yes.

Q. And you agreed yesterday, did you not, that a usufruct, in the technical sense, is a right in rem in property? A. Yes.

Q. And therefore a usufruct in foreign securities is a present right in rem in those foreign securities, isn't it? A. Yes.

Q. And a waiver of a usufruct would affect an immediate change in the legal status of the foreign securities, would it not? A. Yes, as far as the property right is concerned.

Q. Will you explain, then, why a waiver of a valid usufruct is not a present change in the legal status of the property so as to make it a verfugung? A. The waiver of a usufruct for the purposes of foreign exchange control does not directly affect the income from the securities which is alone pertinent to the terms of the provisions concerning Foreign Exchange Control.

Q. But it does immediately and directly affect a right in rem in the foreign securities, does it not? A. Yes.

1585 Q. And the concept of verfugung in the foreign exchange law is fully as broad if not broader than the concept in the general civil law? Is that not right? A. You cannot put it that way, because the Foreign Exchange Control legislation has a different end in mind than the rules of private law do.

Q. But those transactions which are characterized as verfugung, for purposes of civil law, are also characterized as verfugung, for purposes of the foreign exchange rules, aren't they? A. In the foreign exchange law, as in all specialized fields, it is customary to refer to the general concepts of civil law. But it must be decided from case to case whether or not a modification is in order where these concepts do not fit the particular case.

Q. Now, do you know Dr. Hartenstein's book on the law

of foreign exchange, do you not? A. Yes; I have quoted from it myself in my applications.

Q. And it is the principal commentary on foreign exchange law, is it not? A. It is a respected commentary.

Q. Will you look at pages 100 and 101 of Hartenstein's commentary and see if he does not define verfugung for purposes of foreign exchange regulations, in substantially the same way as you have yourself defined the term, in agreement with the earlier text I showed you.

1586 Specifically, isn't it true that Hartenstein defines transactions which are verfugung as sales, pledges, creation of a usufruct; in the case of claims, also performance by the debtor or by a third person; accords and satisfactions, as well as depositing the assets and simultaneously waiving the right to reclaim it; also assignment, set-off, waiver, extension of time? A. So far as I can see now, Hartenstein takes a thing which is quite natural, the concept of verfugung as developed in the civil law, for his starting point, and therefore considers transfer, assignment of claims, the creation of a usufruct, and so forth, as included in the term of verfugung, which is quite obvious.

But he does raise the question, on his own, whether or not the concept of verfugung for purposes of Foreign Exchange Control legislation must be defined in a different way. And after weighing various opinions, he finally inclines to the view that for the time being the concept of the private law of verfugung should be used until by governmental directives the question had been clarified.

Q. Are you in possession of the text of any governmental directives that subsequently did clarify the definition of verfugung? A. I only see from Hartenstein that he refers to general orders, Roman numerals II, IX, X, XXI, XL, XLI, which he says dealt with the matter.

1587 Q. You came all the way from Germany to testify in this lawsuit, didn't you? A. Yes.

Q. And you understood when you left Germany that the main point of your testimony was to deal with the question of waiver of Niessbrauch, didn't you? A. I only knew I was to be questioned concerning matters which came within my observation, but not concerning questions of general law.

Mr. Boland: I would like to make a statement to the Court at this particular time, that this witness was also going to testify in regard to the criminal proceedings, which have been more or less precluded by strong argumentation on the part of the Government. This man was not brought over here as a legal expert to testify on Niessbrauch. He did not come over here to testify on the legal aspects of this case. That was not the purpose of this trip.

By Mr. Burling:

Q. I will renew my question, which you did not answer when I asked it first:

Are you in possession of any texts indicating that the German Government subsequently changed the definition of the concept of verfugung? A. My present memory does not contain anything concerning such a definition.

1588 Q. And Hartenstein specifically includes, within the class of transactions which are called verfugung, waivers? A. I haven't read it here, but I take it for granted. Yes, it is here, a waiver of assertion.

Q. Now, as a matter of fact, didn't you yourself come to the conclusion, in 1935, that a waiver of a usufruct in foreign exchange required a license in order to be valid? A. I stated that different opinions concerning this are possible. But in my application to the Foreign Exchange Control Office of November, I have taken that position which was most favorable to my clients; I took the position that it did not constitute such a verfugung.

Q. I did not ask you, Dr. Gros, what position you took. I asked if you did not yourself come to the legal judgment in July, 1935, that a waiver required a license. A. I have examined the question in my own mind and I have come to the conclusion that different opinions and different interpretations were possible.

Q. But you came to the conclusion in July, 1935, did you not, that a waiver of a usufruct in foreign securities required a license? A. In the terms in which you put the question, I do not remember that.

1589 Q. Will you look at Plaintiff's 96-A, please. I address your attention to the section having the Roman numeral II. Will you look at the fifth paragraph, which begins in English with the words, "This legal situation".

I want to read the second sentence of that paragraph in English and ask you if that is what you said, in your memorandum which you testified yesterday you preferred to clarify your own thinking about the Niessbrauch—

"If a valid usufruct was created, the parents have immediate title to the income and are, therefore, obliged to report and to deliver the foreign exchange which has automatically accrued to them.

"In this connection it must be remembered that the duty to convert foreign exchange cannot be rendered nugatory by a subsequent waiver by the parents of the automatically accrued income. For even a waiver is a transfer within the meaning of the foreign exchange regulations requiring a specific license."

Mr. Boland: I would like the record to indicate, Your Honor, that that is merely an argument in a series of arguments in this particular exhibit.

Mr. Burling: I object to the characterization of counsel of an exhibit. The record should not show any such thing. That is an argument made now by Mr. Boland.

The Court: What is the exhibit number?

Mr. Burling: Number 96. This is a memorandum
1590 the witness testified yesterday he prepared.

The Court: All right.

Mr. Boland: The point I make, Your Honor, is by his excerpting that particular paragraph, it might lend credence to the argument that a valid usufruct has been created, and in the prior arguments in that very exhibit he has been arguing no valid usufruct has been created. That is a "but if" argument.

Mr. Burling: My entire examination of the witness, Your Honor, is on the hypothesis that a valid usufruct was created, and trying to establish it could not be waived without a license.

The Court: All right.

Mr. Burling: And I am trying to bring out the point that the witness himself said in 1935 that it could not be waived without a license.

The Witness: This is a gross misunderstanding.

By Mr. Burling:

Q. I take it, you don't mean a pun? A. I don't know what I should say about this. It is incomprehensible to me how such an answer can be given to me.

Q. At any rate, did you not state that if a valid usufruct had been created, then it could not be waived without a license? Isn't that exactly what you say in this
1591 memorandum? A. No; that is precisely what I am not saying. But I say that the accrued income cannot be waived without a license, and in such clear words that an erroneous interpretation is quite incomprehensible to me.

Q. I agree with you there. But you do say, do you not, "A waiver is a transfer within the meaning of the foreign exchange regulations"? A. Yes, by all means.

Q. And you do say that a waiver within the meaning of

the foreign exchange regulations requires a specific license? A. Yes.

Q. And you also know, do you not, that if parties went through a purported transaction which required a license, without obtaining a license, that purported transaction was void? A. Yes.

Q. Now, going back to the years 1935 through 1937, did you have any personal knowledge whatever as to whether a valid usufruct in the proceeds of 600 Opel shares had in fact been created in 1931, or 1932? A. No.

Q. And, more specifically, you did not have any personal knowledge as to whether Hans Frankenberg held the key to a box in which the Uebersee shares were placed, in the capacity of agent for Wilhelm von Opel, did you?

1592 A. No.

Q. Will you say again when you first heard about the gold case? A. During the Wiesbaden depositions.

Q. I see. You heard Mr. Laufer translate portions of Mr. Fritz von Opel's affidavit during the Wiesbaden depositions, did you not? A. Yes.

Q. And in fact you heard Mr. Laufer read those portions of the gold case affidavit of Fritz von Opel, at the Wiesbaden depositions, in which Fritz von Opel stated that the Uebersee shares were in a box in a bank in Zurich, and that Frankenberg was holding the key to the box as Wilhelm von Opel's agent? Isn't that correct? A. Yes.

Q. And you still say that your difficulty yesterday in understanding the hypothesis I put to you was genuine? A. They are genuine, for the reason that it is difficult to draw conclusions from the hypothesis whether or not a valid usufruct was created.

Q. You did not come to this country now at your own expense, did you? A. No.

Q. Who did pay your passage? A. I was advised that the passage had been paid. I take it that Fritz

1593 von Opel paid for it. I haven't made special inquiry about that.

Q. Are you receiving any additional compensation from anyone for coming to this country? A. No. All I get is reimbursement for my expenses.

Q. You agreed to come here and stay away from your law practice in Germany for many weeks, in return for nothing more than expenses? A. Yes, because I do not suffer any economic disadvantages from it.

Q. And you also have performed legal services in connection with this case in Germany, have you not? A. Yes, I have made repeated inquiries.

Q. Have you been paid or promised pay for those services? A. No.

Q. You just contributed them free? A. I have rendered so many services to the family von Opel, and I have received such large compensation from the family von Opel, that I cannot charge for such petty matters.

Q. As a matter of fact, you are the executor of the will of Wilhelm von Opel? Are you not? A. Yes.

Q. And it is the custom in Germany, is it not, that the executor is paid in accordance with a schedule of fees prepared by the bar associations? A. It is not pre-
1594 cisely that way, but by and large it is correct.

Q. And where the executor deals with an estate of more than a million marks, a fee of one per cent of the estate would be considered appropriate? Is that correct? A. Yes.

Q. And the estate of Wilhelm von Opel, using the marks as they were before their recent devaluation, contained more than ten million marks, did it not? A. Yes.

Q. So that you expect to receive compensation, as executor, of at least a hundred thousand marks, do you not? A. Unfortunately not, because the fee is determined on the basis of the value during the course of the activities of the executor, and the value is substantially less today.

Q. What do you think the value of Wilhelm von Opel's estate is today? A. The large majority of the estate consists of securities which are deposited in a collective ac-

count with a Berlin bank, and it has been seized by the Russians and their legal fate is undetermined as yet.

Q How did you come to be named the executor? A. The will named Fritz von Opel as executor of the estate. It was also provided, in order to take care of all eventualities, that Fritz von Opel could appoint somebody
1595 else in his own stead. This Fritz von Opel has done, and thereupon the surrogate's court in Wiesbaden has issued a certificate naming me as executor.

Q. But at any rate this law business in connection with the estate of Wilhelm von Opel was given to you by the action of Fritz von Opel? Is that correct? A. Yes.

Q. Going back to your retention by Wilhelm von Opel in connection with the usufruct, when were you first retained on this subject? A. The Niessbrauch was already involved in the criminal proceedings. But the actual mandate in that respect I received about the time I prepared this memorandum of law.

Q. When did Wilhelm von Opel first say to you that he considered the usufruct as nugatory? A. I cannot state that from memory.

Q. Was it just at the time this memorandum, which is Plaintiff's 96, was prepared, or earlier? A. I cannot state that on memory. I would have to draw conclusions which would be uncertain.

Q. What is your best recollection? A. I can't give another answer than the one I gave already.

Q. At any rate, at the time you prepared Plaintiff's 96, the thought had occurred to you, had it not, that
1596 the German authorities might require or seek to require Wilhelm von Opel to report his usufruct in foreign exchange, for Foreign Exchange Control purposes and for tax purposes? A. Yes. The fear that the German authorities would take steps with respect thereto was always alive, because of the mempry of the preceding criminal proceedings involved.

Q. And therefore you understood, did you not, it was extremely important to Wilhelm von Opel to make it appear to the German Government that there was no usufruct? A. That was very important for him in order to restore to him the sense of legal security which otherwise was absent.

Q. And that was the purpose of all the legal activity which you carried on, about which you testified yesterday, wasn't it? A. Yes.

Q. You testified yesterday concerning Plaintiff's 97-A, and stated there was a draft attached to it, did you not? A. Yes, sir.

Q. This draft was not signed, was it? A. No.

Q. And no other document of this nature, that is, a formal, written amendment of the gift agreement of October 5, 1931, was ever signed, was it? A. None that came to my personal attention; but I assume that there was none, because the parties relied in this respect entirely on 1597 what I advised them to do.

Q. You testified yesterday, at page 1537, as follows:

"Question: Doctor, you have testified, have you not, that the draft attached to Exhibit 97-A was a draft of an agreement in connection with waiving the Niessbrauch?"

And you answered—

"I did not say that this draft was a draft for a contemplated waiver of the usufruct, but was a draft of a statement to the effect that the parties considered the usufruct as being no longer in effect."

I ask you to look at the letter to which the draft was attached. It is there stated, is it not?—

"The parties to this agreement intend to take action on the basis of this conclusion, and to declare explicitly

in a supplement to be drawn up to the deed of gift that the usufruct stipulations contained therein will be considered as void."

Is that not a statement of what the parties intend to do in the future, rather than a statement of what they think did happen in the past? A. That is correct, upon a strictly literal interpretation.

Q. Thank you. Now, coming to the hypothesis that a valid usufruct did not arise, because of failure of
1598 delivery of possession to the usufructuary, there is still a very difficult legal problem, is there not, as to whether a waiver to a claim to create a usufruct, or a waiver to a claim to income, would be valid without a license? A. I did not consider that problem as such a serious one.

Q. I see. You heard Dr. Kronstein testify concerning the German law, did you not? A. I was only present for a short time, and I understood very little. Most of the time I was not present.

Q. Well, you understand, do you not, that plaintiffs have three hypotheses, three possible ways, in which they say the gift agreement of October 5, 1931, can be construed? A. I have heard about that from Dr. Kronstein. But if it is important, I would like to be told about these three possibilities again.

Q. You understand that the first hypothesis is that what was done on October 5 was that an agreement was entered into whereby Wilhelm von Opel had a claim to receive 80 per cent of the income from the gift? A. Yes, a claim in personam.

Q. On that hypothesis, in 1935, Wilhelm von Opel had an in personam claim against Fritz von Opel for 80 per cent of the income? Is that right? A. Yes, in the event of emergency, as I was always told.

1599 Q. That may have been the purpose of the gift, but it was a present in personam claim which Wil-

helm von Opel could exercise legally at any time he chose? Isn't that so? A. Yes, for the case of an emergency.

Mr. Boland: Your Honor, I think this is quite confusing. Dr. Kronstein was testifying as an expert, and in giving his interpretation of the gift agreement alone, he knew nothing of the facts of the case. They are asking questions of Dr. Gros for truth of the purpose intended by this reservation from the father and mother. And he cannot distinguish as to the right of distress, which was not present in Dr. Kronstein's testimony.

The Court: I am a little bit lost in what you are trying to develop here, Mr. Burling.

Mr. Burling: What I am trying to get at, Your Honor, is that even in the event that the Court should believe von Opel's testimony that there was no agency, and disbelieve his testimony earlier that there was an agency, and therefore that the usufruct, the right in rem, did not arise, but it was merely a right in personam, even that, I say, could not be waived as a matter of German law.

The Court: I don't think this witness is the one to be asked about that, on cross examination—I mean, about something Dr. Kronstein said on the stand here. If
1600 he had that in view, or in mind, when he drew these papers. That might be different. But I don't think we want to go into his observations in regard to what Dr. Kronstein said.

Mr. Burling: I was trying to exhaust the possibilities. My position is that there was no possible way in which this could be waived without a license.

The Court: But you have asked him that extensively, and now you are taking up some view of Dr. Kronstein's, from three different points of view, and asking his opinion about them, which I think is not proper cross examination.

Mr. Burling: Very well, Your Honor. But the witness did testify about waiver in general, and so far I have asked him only about waiver of a right in rem.

The Court: I think you can ask him about anything which operated on his mind when he drew any of these papers, or the agreement about which he has testified, but not otherwise.

Mr. Burling: Very well, Your Honor. I will drop the hypothesis.

The Court: I think we have been going rather far on that other proposition. He is not really your expert.

Mr. Burling: Well, Your Honor, the point is—

The Court: I think I will just sustain the objection. My ruling is going to be that anything he said or did, or any views he had at the time he drew this, you may ask him about.

I don't think we ought to take the time to try to
1601 pick out of him, by way of cross examination, some present view he has as to the law.

Mr. Burling: If Your Honor please, he did express the view that a waiver could be made.

The Court: I know. Anything he said at that time you may ask him about.

Mr. Burling: Yes, Your Honor.

By Mr. Burling:

Q. Did you express the view to any official of the German Government that due to any action taken by Wilhelm, Marta, and Fritz von Opel, rights which Wilhelm and Marta von Opel possessed ceased to exist? A. Yes.

Q. And was it not clear to you that no such rights could cease to exist in the absence of a license from the German Government? A. No.

Q. Did you advance arguments to the German Government and to Wilhelm von Opel to the effect that rights which Marta and Wilhelm previously held had come to an end validly, even though no license to terminate those rights was ever obtained? A. Yes; that is the very purpose of my applications addressed to the Foreign Exchange

Control Office in Wiesbaden of October 8, 1935, and my subsequent letter to the Federal Office of Foreign Exchange Control.

1602 Mr. Burling: I would ask Your Honor if you would clarify the ruling. I do not understand what I am allowed to do and what I am not allowed to do. I did think I would be allowed to try to point out to this witness that the position he took before the German Government is clearly contrary to the German law.

The Court: I think you have been permitted to cross examine at length. Ask him about this license, and the necessity for it. What I was sustaining the objection to was that you took up the series of claims that this other witness on the stand in this trial advanced, toward getting his opinion on those claims.

Mr. Burling: I will drop that, Your Honor.

The Court: Any matter that came to his mind at or about the time he rendered a statement or opinion, or took any action that has been testified to on direct, I think is pertinent.

Mr. Burling: Then I shall confine myself to that, Your Honor.

Mr. Boland: It would seem that this witness has testified that in his opinion no license was needed. And it seems to me incumbent upon the defendants to prove their point as a matter of law with their expert.

The Court: As I understand it, he asked him any number of questions about that. If he hasn't completed it,

1603 I will permit him to do that.

Mr. Burling: I have not asked more than one or two questions on whether you could waive an in personam right.

The Court: I thought I remembered you specifically asked him that. But you can ask it again.

By Mr. Burling:

Q. Will you not agree, Doctor, that a claim to receive income from foreign securities falls within the purview of the foreign exchange regulations? A. As far as I remember, I have never stated such a claim in my application, but have always spoke of a claim to the subsequent creation of a usufruct.

Q. Well, I now ask you, will you agree with me that a claim for income from foreign securities would be a claim within the purview of the foreign exchange regulations? A. Yes; I would agree to that at first blush.

Q. Now, do you have any authority whatever for the proposition which you gave to the German Government that a claim to have a usufruct created in the future, in foreign securities, could be waived without a license? A. I do not have authority for that, but I have the statement from Reichsbank Director Wilhelm that his lawyers agreed with my legal position.

Q. We will come to Wilhelm in a moment. But do you have any formal legal authority of any kind that you
1604 can cite? A. Neither a position pro nor a position contrary can be directly read from the statute.

Q. Do you have any commentary, article, or decision, or other formal legal matter, that supports your position? A. No. This singular case, as far as I know, had never been decided before and had therefore to be decided in accordance with general principles, and my position was subsequently approved.

Q. But whether or not is was approved, which you understand is in dispute, do you have any subsequent formal writing of any kind that supports your position? A. I can only refer to my memorandum of August 8, and December 27.

Q. You wouldn't expect any court to accept as a formal authority a self-serving letter written by you, would you? A. Of course, I base my argumentations on the law. But

in so far as the law does not provide in unequivocal language for this particular case so that you can simply read the decision from the text, general arguments have to be made which are based—

The Court (interposing): We are going to a terrible lot of length about nothing. He asked him if there was any formal decision. Ask him that. That is all we want to know.

1605 The Witness: No.

By Mr. Burling:

Q. Now, coming to your conversation with Wilhelm, assume that Wilhelm says what you say he did. A. Yes.

1606 Q. Wilhelm's lawyers would still be expressing an opinion on a state of facts furnished by you, wouldn't they? A. Of course.

Q. And you had no personal knowledge of what the facts were, did you? A. I had the gift agreement.

Q. But you didn't know what had been done—you had no personal knowledge of what had been done between the parties after the gift agreement, did you? A. Yes, to this extent, as the parties in my presence have waived their rights arising out of the usufruct provisions.

Q. Orally? A. Yes.

Q. Now, will you not agree if you were either mistaken when you told Wilhelm the facts or untruthful, then Wilhelm's opinion would be of no value whatever? A. If the facts relative in law, which were assumed, were in fact not existent, then you are right.

Q. As a matter of fact, it wasn't any of Wilhelm's business to pass on any of this matter at all? A. The opinion of Wilhelm was entirely sufficient for my purpose because I didn't want a license within the meaning of the foreign exchange control laws but solely for a confirmation of some

authority of my position for purpose of legal security.

1607 Q. But Wilhelm had no authority to construe foreign exchange laws with respect to what transactions required and what didn't require licenses, did he? A. In general, no, except that he may have gotten in touch with the Reichs Office for Foreign Exchange Control.

Q. But the agency of the German Government which would have final authority to issue licenses or determine what transactions needed to have licenses was the Reich Office for Foreign Exchange Control; isn't that right? A. Yes; it generally had the task of issuing such decisions.

Q. And you don't know whether Wilhelm did or didn't get an opinion from the office having jurisdiction over the subject matter? A. I cannot state that from my own knowledge, but I take it for granted.

Mr. Burling: That is all.

Redirect Examination

By Mr. Boland:

Q. Doctor, the purpose of these particular letters to the various agencies in Germany, you have testified, was for an approval of the waiver of whatever rights the father and mother had reserved to themselves; is that right?

A. Yes.

1608 Q. And that, as far as you know, there was no usufruct ever created with respect to this gift agreement; is that right? A. No.

Q. And therefore the purpose of these writings to the various German agencies was not to make it appear that a valid usufruct had not been created? A. No.

Q. You have stated, Doctor, that the parties never signed the draft attached to Exhibit 97-A. A. I stated that I had no knowledge about that, but I would have known about it because the parties always followed my advice.

Q. This draft wasn't prepared for purposes of signature by the parties, was it, Doctor? A. No.

Q. And therefore the fact that it wasn't signed is of no significance? A. Yes.

Q. Doctor, how is it that you happened to go to see Director Wilhelm in respect to this Niessbrauch? A. One day I received a telephone call in the year 1937, according to which Reichsbank Director Wilhelm wished to talk to me.

Q. And you testified that you, in fact, went to see
1609 Director Wilhelm as a result of this call, did you not? A. Yes.

Q. And when you went to see Director Wilhelm, did he talk about this Niessbrauch? A. Yes.

Q. And when he stated that his attorneys approved of your position, did he indicate whether they were attorneys within the Reichsbank or some other government agency? A. I cannot state that. I only remember that he had the file before him and said "our" lawyers. That was an ambiguous term. Whether he meant lawyers of that agency or lawyers who had been assembled for that purpose, I cannot state.

Mr. Boland: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Mr. Burling: I move to strike all the testimony concerning the conversation of this witness with Reichsbank Director Wilhelm as being irrelevant to any issue in the case.

Mr. Boland: I think we presented this issue yesterday, and it is the same issue.

Mr. Burling: I made the objection before the evidence came in and I now renew it.

Mr. Boland: I will restate my position.

1610 The Court: Tell me about it.

Mr. Boland: The entire point of Dr. Gros' testi-

mony, it is not if the statements of Director Wilhelm are the truth, but whether he stated it, and he stated it.

The Court: What did he state?

Mr. Boland: He stated in effect that the position taken by Dr. Gros whether the waiver of the rights of the parties was within the Foreign Exchange Control, he stated in effect that their attorneys agreed with the position of Dr. Gros that no waiver was necessary.

Now, the releyance of this testimony is that the parties relied on the advice of Dr. Wilhelm in knowing they were not going to incur criminal penalties under Foreign Exchange Control.

The Court: And therefore, what?

Mr. Boland: And therefore that the parties were free and waived any direct rights.

Mr. Burling: That does not follow at all. The parties were or were not free in accordance with what the German law was. If the German law, as we contend, required a license in order to waive rights, the hearsay opinion of a bank official, whom this official says agrees with him, was not the proper German authority, and it is wholly irrelevant.

The Court: Let me see if I get the purpose. Some question arose around this period—1935, was it?

1611 Mr. Boland: Yes.

The Court: As to whether this Niessbrauch existed or not; is that correct?

Mr. Boland: We do not contend in any sense of the word—

The Court (interposing): What was the question that arose in 1935?

Mr. Boland: The question first arose in respect to the criminal proceedings, which is handled by stipulation—merely that the old man was fined, and as a result of that, the old man wanted to get rid of all his rights and wanted no more trouble with the German Government, and that is when Dr. Gros was hired for getting rid of all rights, as

the father and mother were sick of it, and they had enough money to go on with, and they told him at that time, as Mr. von Opel and Dr. Gros testified, that the family wanted the right in case of distress, in case of financial need.

The Court: And your point is: If it was determined by his counsel and by the authorities that he had any rights which he needed to get rid of to comply with the law, he would have done it at that time?

Mr. Boland: That is right.

The Court: And that the lawyer and this man in the Government, whether right or wrong, having advised him that he had no rights or no necessity to get rid of them, that he did not take that action. I think I will per-
1612 mit that to stand.

Mr. Burling: Even assuming that were proved, it would still be irrelevant because they, in fact, didn't get a license.

The Court: You can argue that at the conclusion of the case.

Sometimes these department heads give you a wrong opinion, and if you rely on it, it would be a reason why you did not take some action you might have otherwise taken.

Mr. Gallagher: Can we have a five-minute recess? We are about to read about twenty minutes of Reichsbank Director Wilhelm's testimony.

The Court: I will take a five-minute recess.

(Thereupon a short recess was had. The following then occurred):

1613 Mr. Boland: At this time, Your Honor, we are going to offer pertinent parts of Director Wilhelm's deposition. The deposition was taken on Tuesday, April 6, 1948, as a witness of the defendant, in Washington, D. C.

I will just ask the reporter to copy in the first page of it, page 485, which makes reference to the notice filed and the persons who were present.

(Page 485 of the deposition reads as follows:)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 26453

UEBERSEE FINANZ-KORPORATION, A. G.

Plaintiff,

v.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian.

Defendant.

Washington, D. C.
Tuesday, April 6, 1948

"Deposition of Carl Friedrich Wilhelm, a witness of lawful age, called on behalf of the Defendant, pursuant to notice, filed with the Court of the Court at Room 670, in the Home Owners Loan Corporation Building, First Street and Indiana Avenue, Northwest, beginning at 1:30 p.m. before Braxton O. Watson, a Notary Public in and for the District of Columbia when were present on behalf
1614 of the respective parties:

"Gallagher, Osherman, Connor & Butler,
By: Richard J. Connor, Esq., and Christopher Boland, Esq., 831 - 15th Street, N. W. Washington, D. C. Appearing on behalf of the Plaintiff.

"Myron C. Baum, Esq., and Joseph Laufer, Esq., Attorneys of the Department of Justice, Appearing on behalf of the Defendant."

Mr. Boland: This is part of the direct examination. It reads:

"CARL FRIEDRICH WILHELM

was called as a witness on behalf of the Defendant, and, having been first duly sworn by the Notary, was examined and testified as follows:

"*Direct Examination*

"By Mr. Baum":

(Thereupon Mr. Boland read the question of the witness and Mr. Gallagher read the answers of the witness.)

"Question: Mr. Wilhelm, what is your full name?

"Answer: Carl Friedrich Wilhelm; Friedrich is the name by which I am called.

"Question: And where do you reside?

"Answer: Berlin, Dahlem Koenigin-Louisestr 87.

"Question: And what is your age?

"Answer: I am 59 years and two months old."

Mr. Boland: We are now turning to the middle of page 487, still continuing with Dr. Wilhelm's testimony.

1615 "Answer: * * * In May, 1930,"—

Mr. Burling (interposing): I think that question is relevant ~~and I~~ request you read it:

"Question: Will you briefly describe for us the nature of your education.

"Answer: After attending elementary school, and the usual preparatory schools, I passed in 1908 the examination qualifying me for admission to German Universities;

and subsequently studied law and political science for about four to five semesters.

"Then I became a banking apprentice of the bank which was then called the Bank for Trade and Industry, which later became the so-called Darmstaedter Bank.

"After completing my apprenticeship, I remained at the bank as a bank employee; and in August, 1914, I was called for military service as a member of the reserves."

Mr. Burling: You have read all of that section we want.

Mr. Gallagher: All right.

"Answer: * * * In May, 1930, I was assigned to Kempen im Allgaeu, as director of the local branch there; and upon the outbreak of the monetary crisis in August, 1931, I was called to Berlin as an official in charge of a certain field; and from 1934 to 1939, I was employed in the Directorate of the Reichsbank, first as an official in charge
1616 of a certain field; subsequently, that is, from 1935 on, as Vortragender Direktor, a title which implied a nominal promotion only.

"In February, 1939, I joined the Reichsbank directorate as a full member. In this position, I remained until the final collapse.

"Question: And from 1931 until 1939, what were your duties in the Reichsbank?

"Answer: I was in charge of foreign funds control.

"Question: And were you the sole person in charge, or did you have a superior?

"Answer: I had superiors.

"Question: And who were they?

"Answer: From 1931 to 1933, the official immediately superior to me was a Mr. Richard Fuchs, a Reichsbank director and member of the Reichsbank directorate. After 1933, it was Mr. Puhl, the later vice president of the Reichsbank. His first name is Emil. Beginning in 1939, I had no superior.

"Question: What were your duties after 1939?

"Answer: My duties were the same as before except for the fact that they were broadened, since I became the chief of all problems relating to foreign funds. That field included not only foreign funds control but also the trade in foreign funds.

"Question: And can you describe for us generally
1617 the functions of the Reichsbank in connection with foreign funds control in Germany?

"Answer: Briefly summarized, the function of the Reichsbank in the field of foreign funds control was as follows: One, to take control of all foreign funds available. The term 'foreign funds' also includes gold.

"Further, to see to it that all foreign funds accruing from abroad were actually transferred to Germany. That is, the foreign exchange which accrued from export and from capital transactions.

"Furthermore, the Reichsbank was the sole agency authorized to make foreign funds available. In doing that, the Reichsbank did not act alone; but it delegated its authority to the so-called commission banks, the so-called foreign funds banks; called 'Divisenbanken'."

Mr. Boland: At this point we are skipping through—

Br. Burling (interposing): Read further.

Mr. Boland: How far?

"Question: Was it the function of the Reichsbank to render legal opinions to the members of the public on foreign funds control matters?

"Answer: No, the Reichsbank did not render legal opinions.

"Question: What agency of the German Government had such a function, if any?

1618 "Answer: Such agency did exist. It was the Foreign Funds Control Offices, which were subordinated to the Reichs Economics Ministry.

"Question: Well, in addition to these Foreign Funds Control Offices, did the Economic Ministry itself render any such opinions?

"Answer: Yes, in all those instances in which the Foreign Funds Control Offices did not consider themselves qualified."

Mr. Boland: We are skipping to page 591, and it is the second and last paragraph of the answer, and the question by Mr. Baum is in connection with the third occasion in which Director Wilhelm had an occasion to come in contact with the von Opel problem.

"Answer: * * * In 1937, and that is in the first six months, the Reichsbank branch in Wiesbaden sent me a written inquiry: What shall we do about the foreign funds connected with the niessbrauch of Mr. von Opel?

"I advised the Reichsbank branch in Wiesbaden to approach Mr. Wilhelm von Opel, and to inquire where the foreign exchange connected with the niessbrauch had remained. Thereupon, a Dr. Daniel Gros appeared in my office and advised me that the niessbrauch was subject to a condition precedent; that is, it should only become operative if Wilhelm von Opel would become financially
1619 distressed. Moreover, it was the agreement of both parties that the niessbrauch would be waived; and thirdly, the niessbrauch had not come legally into effect at all, since certain defects as to its form had occurred, which I do not recall now.

"And he requested me to waive the demand for surrender of foreign exchange. I advised him that I could not do that; I would have to submit the matter first to the legal counsel of the Reichsbank. Moreover, his request involved modification of the agreement, over which the Reichsbank had no jurisdiction.

"The Reichsbank attorneys reviewed the statements made by Mr. Daniel Gros and came to the conclusion that on the

basis of the prevailing facts, we did not wish to undertake anything against Wilhelm von Opel."

Mr. Burling: Will you continue, please?

"Answer (continued): The reason for this conclusion was the following: In view of the often insufficient draftsmanship of the foreign funds control provisions, it might happen that a judge unfamiliar with the subject matter of foreign funds control would reach a conclusion adverse to the position of the Reichsbank. Such an adverse decision, however, would imply a loss of prestige to the Reichsbank. Such a loss of prestige, however, would have been intolerable to the Reichsbank, as the guardian of the German currency and the foreign funds."

1620 Mr. Burling: Will you continue, please?

Mr. Gallagher: We object to continuing any further because the remainder is hearsay.

Mr. Boland: Where he finished, at this particular point, the next sentence, if that is permitted in the record, we will ask Your Honor to bring the whole criminal proceeding in because if that sentence is permitted to go in the defendants will have tendered the best parts of the criminal proceeding without having had the disadvantages which we see in the criminal proceedings to their side, and we object to giving the statement to Your Honor.

Mr. Gallagher: We can give it to you off the record so you can rule.

(Thereupon a discussion was had off the record.)

The Court: I do not think this would be important or relevant. I also think and I am afraid if we get into it we might have to open the whole field up, which I do not want to do. We will leave that out.

Mr. Boland: We will skip to page 509, still questioning by Mr. Baum,—

Mr. Burling (interposing): Read the first paragraph, starting with the first paragraph on page 503.

Mr. Boland: And read all the way through to 509?

Mr. Burling: Those two paragraphs are important.

The Court: I will tell you what you do: Either
1621 of you gentlemen read what you want as you go along.

Mr. Gallagher: At this point, Your Honor—and this is off the record again.

(Thereupon a discussion was had off the record.)

The Court: Read it. If you have objection, I will consider it later.

If you are going to have a lot of this, I would like to have you mark it between you.

Mr. Boland: Is this the first paragraph on 503?

Mr. Burling: Yes, and the second paragraph, which begins, "I also know."

Mr. Boland: We object to the introduction of this without having full opportunity to explore the depositions of Fritz von Opel, and we will not permit innuendoes to be drawn without a complete exploration of the deposition.

Mr. Burling: I don't know how Your Honor can rule on it, without reading it.

The Court: I do not know, either.

Mr. Boland: I will show it to you. It is the first and second paragraphs on this page (handing a document to the Court).

The Court: That has already been testified about, that first. Somebody testified about that. I think Mr. von Opel testified about it himself, didn't he? He was asked about that.

1622 Mr. Gallagher: He testified he brought some marks back and transferred them.

The Court: I don't know that he brought them. He testified he was asked.

Mr. Boland: I don't want to leave the impression with the Court that his offer to take dollars or foreign exchange back to the country was necessarily against the interests of the Reichsbank in respect to the waiver.

Mr. Burling: We contend it was and it is therefore relevant.

The Court: This first paragraph he has already testified about. It was by Mr. von Opel and without objection. I am sure of that because I remember the testimony.

Let us see the second one. On that ground I will permit it because I think it is already in the record without objection.

Well, now, Mr. Burling, what is the significance of the second paragraph?

Mr. Burling: I will withdraw my request for that paragraph.

The Court: All right. Just read that first one.

"Answer: * * * It was decided that I undertake negotiations with Fritz von Opel with a view to insure by such negotiations that foreign funds would be surrendered by
1623 him on a voluntary basis, for the Reichsbank needed foreign funds and had to have them. The Reichsbank was not interested in criminal penalties."

Mr. Boland: Now, on page 509, a question by Mr. Baum:

"Question: Now, coming to the third occasion which you referred to, you testified that Dr. Daniel Gros came to see you. Did you ask him to come to see you?

"Answer: No, not for his first visit; decidedly not. As to the second visit, I had to reply to him with respect to what may be called his questions.

"Question: And on the occasion of these conferences with Daniel Gros, did he send you or deliver to you any letters?

"Answer: After the second conference, he, personally, appeared for a third meeting, and upon the occasion of this

third meeting, he handed a letter to me, in which he set forth, so to speak, what he claimed to be the result of the second conference.

"Question: I show you now Plaintiff's Exhibit 51"—that is Exhibit 101 now—"and ask you whether that is a copy of the letter to which you refer?

"Answer: That is the letter; I have seen it; that is the one he gave to me. That is, he wanted to hand it to me. I told him, 'What should I do with the letter? Take it back again.' I do not recall now whether, in the end, I took it myself, or whether he left it outside the door with the receptionist.

1624

"Question: I call your attention to the statements made in the second paragraph of that letter and ask you whether that paragraph correctly states what you told Dr. Gros?"

Mr. Boland: I believe we better read that:

"I informed Mr. Fritz von Opel that you told me that your legal aids in charge of the usufruct case also denied that Geheimrat Dr. Wilhelm von Opel had a monetary claim against Mr. Fritz von Opel and that, consequently, no legal obligation exists within the terms of the provisions of the foreign exchange law."

"Answer: This paragraph is not correct. I am certain that I did not tell him that I considered a claim of Dr. Wilhelm von Opel as non-existent. What I told him was that we did not wish to enforce such a claim.

"Question: Were you in any way embarrassed when Dr. Gros handed you this letter?

"Answer: In my capacity of chief of the Foreign Funds Control Office, which I pursued for many years, I do not recall having ever been embarrassed by a letter of this kind. If Dr. Gros so testified, I am sure it must have been his subjective impression.

"Question: Did you tell Dr. Gros whether or not you could reply to this letter?

1625 "Answer: I do not remember that I told him expressly, 'You will not get an answer', but it is certainly not true that I promised an answer.

"Question: Did you ever reply to this letter?

"Answer: This letter was never answered.

"Question: Why not?

"Answer: I must make an explanation which, as such, has nothing to do with this case. We have had the experience that written statements made by the Reichsbank were repeatedly abused by the addressees. We did not know what Fritz von Opel or Daniel Gros intended to do, or what purpose they had in mind, with such a letter of reply. And, furthermore, it was entirely immaterial to us what opinon Mr. Daniel Gros had concerning the legal question.

"Question: What do you mean by the legal situation?

"Answer: What I mean is, Mr. Daniel Gros stated that I had denied the existence of a legal claim by Wilhelm von Opel against Mr. Fritz von Opel; and it was immaterial, as far as we were concerned, whether he was of that opinion or not. He had no written statement from us which he could present somewhere else. I refused to make a statement in writing, as I had said before.

"I would like to add that I would not have given an answer to Mr. Daniel Gros, even if he had been right, because it would have been a declaration against our own interests."

1626 Mr. Boland: Now, page 514.

Mr. Burling: On page 512, Your Honor, the last question and answer on the page, I request be read.

"Question: When Dr. Gros delivered this letter, Plaintiff's Exhibit 101, to you, did you tell him that the statements contained in that letter were not true, in your opinion?

"Answer: According to my recollection, yes; I do not recall the precise words which were used, but, according to my recollection, I told him something like this:

"'Mr. Gros, the matter was not that way.'

"I did not say more, for the simple reason, already to avoid an unfolding of the underlying problems; and that is why I confined myself to that answer."

Mr. Boland: Now, on page 514, and this is cross examination by Mr. Connor—skipping to page 539 in the middle of the page. This is still cross examinaton. On page 539, question by Mr. Connor:

"Question: When was the first conference which you had with Dr. Gros in reference to the niessbrauch matter?

"Answer: In my recollection, it was in the neighborhood of the end of the first half of the year 1937.

"Question: And was Fritz von Opel with Dr. Gros on that occasion?

"Answer: No.

1627 "Question: When was the next conference, if any, with Dr. Gros in reference to the niessbrauch?

"Answer: Perhaps eight or ten days later.

"Question: And then did you have a third discussion with Dr. Gros about the niessbrauch?

"Answer: Not in the niessbrauch matter. Whether he came to see me later, another time in another matter, I do not know."

Mr. Boland: This is page 559, and still cross examination by Mr. Connor.

"Question: Well, isn't it a fact that the reason you didn't pursue any court procedure was the fact that you were convinced that you had no case at all?

"Answer: No. The only reason why we didn't go to court was that we did not want to assume the risk of losing the case. No matter whether the losing of the case resulted from the legal situation or from interference of higher places."

Mr. Boland: The Court indicated you will read those later, Mr. Burling.

Mr. Burling: If Your Honor please, the difficulty about that is we are going to get the record chopped up. If you have it read, you can read it.

Mr. Boland: That is all we want to read, Your Honor.

The Court: Read what you want now.

1628 Mr. Burling: I want just the next sentence, and I shall read from page 559 where you stopped reading.

Mr. Gallagher: Wait a second, just a minute, please.

Mr. Burling: I will withdraw that.

Mr. Gallagher: All right, then.

Can we recess now, Your Honor? We want to start with another witness.

The Court: You can do that this afternoon.

Who do you have this afternoon?

Mr. Gallagher: Dr. Kaufmann and Dr. Kronstein.

The Court: Dr. Kronstein?

Mr. Gallagher: He is coming back on nationality but not on this.

The Court: Who is the other one?

Mr. Gallagher: Dr. Kaufmann.

The Court: Is he a lengthy witness?

Mr. Gallagher: I don't believe so, Your Honor; not on direct examination.

The Court: Do you think you may be able to conclude with these two today?

Mr. Gallagher: I think so.

The Court: Do you have any more testimony after that?

Mr. Gallagher: Not at this point, but we would appreciate it if the Court would indulge us, that we not close today, because it is our intention to bring Mr. Gaeng

1629 here from Switzerland in connection with the identification of the book situation yesterday.

Mr. Burling: May I say something?

I have two witnesses from out of town who will have to go home. One is a short witness, Calvin Houghland. If we could put him on, he would not have to come back.

The Court: Whatever you agree on, will be all right. I have a luncheon engagement but I think I can make it by 2 o'clock. It is one I had made some time ago. I will be back at 2 o'clock, and if I am late, it won't be more than five or ten minutes.

(Thereupon, at 12:30 o'clock p. m., a recess was taken until 2 o'clock p. m., for the luncheon recess.)

1630 AFTER RECESS

Mr. Boland: At this time, Your Honor, we would like to call Dr. Kaufmann to the stand.

Mr. Burling: I am still discussing what I was. If Your Honor please, I think we do not wish to read any more of the deposition of Reichsbank Director Wilhelm. Before I make that statement flatly, may I ask Your Honor once more about a question of a ruling. The point is, there is evidence which we would wish to put in—that is, additional testimony by Wilhelm—if the ruling is one way and not if it is another way, and it is quite an important point.

I think I understand Your Honor, but I ask leave to ask you once more. Do I correctly understand that Your Honor is admitting the testimony of the witnesses Gros and Wilhelm concerning what Wilhelm said to Gros merely as evidence that he said it and not as evidence concerning the correctness of what he said or his motive for saying it?

The Court: That is correct.

Mr. Burling: Thank you, Your Honor. Then we do not wish to read any more of the Wilhelm deposition.

The Court: That is the only purpose for which you offered it, is it not?

Mr. Boland: Yes, sir. At this time, Your Honor, we would like to call Dr. Kaufmann to the stand. Whereupon—

1631 OTTO KAUFMANN, was called as a witness on behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boland:

Q. Would you state your full name for the record, Doctor? A. Otto Kaufmann, with one "F" and two "N".

Q. And your place of birth? A. Zurich, in Switzerland.

Q. And your date of birth? A. February 28, 1914.

Q. And what is your nationality, Doctor? A. Swiss.

Q. And you are a Swiss citizen? A. I am a Swiss citizen, yes.

Q. Would you state your educational qualifications, briefly? A. I entered grammar school in Zurich in 1920, went through grammar school and through the gymnasium of Zurich, and came out of there in the fall of 1932.

Q. What do you mean by gymnasium, Doctor? A. Gymnasium is a combination of high school and junior college.

Q. And after 1932? A. After 1932 I first worked
1632 in a bank for near to a year, at Geneva.

Q. And what position did you hold in the bank? A. Oh, I was there just to get a little acquainted with banking practice, as a volunteer.

Q. How long were you in the bank? A. Near to a year.

Q. Does that bring us to 1933? A. Exactly.

Q. Then what did you do? A. Then I entered the law school of the University of Zurich, and I studied law there up to February 1939, where I got my degree of doctor of law.

Q. And then what did you do? A. After that I was mostly in the army during the rest of '39 and '40, and then I became a secretary in the trial court of Uster, U-S-T-E-R, in the countryside of the State of Zurich, Switzerland.

Q. What is the position of secretary to the court? A.

There are different degrees of secretary. First you are just an assistant of the main secretary. Now, later on, when the main secretary was in the army, I replaced him; and then the secretary is the legal advisor of the court, because the trial courts are mostly made of laymen; just the president in that court was a lawyer.

1633 Q. And the secretary did what? A. He is the advisor of the court, and he also writes all the opnions, because in our country the judges do not write the opinion themselves, but the secretary writes the opinion for the whole court.

Q. And how long did you remain in this position? A. Something around nine months, altogether, with interruptions by military service.

Q. And this brings us to approximately what year? A. Oh, to beginning of 1942.

Q. Then what did you do? A. Then I entered the law office of my father, I passed the bar examination at Zurich, and then I entered a law firm at Uster, and I worked as an attorney of law in that law firm.

Q. For how long, Doctor? A. Till to the end of '43, I think.

Q. Then what did you do? A. And then I was asked by the Swiss School of Economics, the University of St. Gallen, to become a legal assistant in that university, and to start my academic career. That time I wrote my main publication on the new agricultural real estate law of Switzerland in order to become a so-called privatdozent; and when I was admitted I became a full-employed privatdozent. That is practically similar to an assistant professor in this country.

1634 Q. Did you have any other legal writings? A. My first publication that has been printed was my thesis on the liability in the corporation limited by guarantee, and now my last important publication is the commentary on the articles on legal accounting in the main commentary of corporation law of our country.

Q. What is the significance of the commentary in Switzerland? A. Switzerland is a code country. We unify the private law in a statute enacted in 1912, and the commentary gives the legal opinions with reference to the cases following the disposition of the code, article by article. That is a commentary.

Q. How long did you remain as a professor at the university? A. I am still a full-employed privatdozent, and of the Swiss School of Economics, but in the fall of '47 I came over to the Yale Law School to study there for advanced legal studies, and I got my Master's degree last summer at the Yale Law School.

Q. What is your present occupation? A. Then I returned to Europe and I came back, and I give now a course of comparative law at the Yale Law School. Besides this I am doing some legal research work.

Q. And you are presently teaching, are you? A. Yes,
I give this course, as I told you, comparative
1635 law.

Q. Doctor, I show you now Plaintiff's Exhibit 5 and 5-A and ask you whether you are familiar with this agreement. A. Yes, I read it.

Q. Directing your attention to the first paragraph on page 2 of the English translation of Exhibit 5, would you read this paragraph, please.

Mr. Burling: Just a minute, please. I object to any such testimony by Professor Kaufmann, because it is wholly irrelevant and immaterial. The document which the evidence establishes beyond peradventure, was drawn up between two German citizens, within Germany, relating to shares of German stock which were physically located in New York under an escrow agreement. I submit that no question which this witness—there is no question relating to this instrument which this professor is competent to express an opinion on.

Mr. Boland: May I make a statement, Your Honor. The

plaintiff corporation is a Swiss corporation. The shares of stock of Uebersee, the plaintiff corporation, are shares of stock which it has been stipulated is the present corpus of the gift agreement. This res, or these shares of stock are presently located in Switzerland and were located at the time of vesting in Switzerland.

If a usufruct were established in connection with this particular gift, it would have been established under
1636 Swiss law. If a usufruct were demanded, or if the parents demanded the son to set up a usufruct, it would have been set up under Swiss law.

The second but more important phase of this particular testimony is in connection with the waiver, and a waiver although true enough made among donors who were German citizens we think entirely material at this time to show the Court the effect of such waiver under Swiss law in connection with the corpus of this gift, whether a usufruct was or was not established. We think it is very, very material.

Mr. Burling: I am not sure that I would not tentatively agree with Mr. Boland on the second point. I cannot understand, however, how this witness can testify about a transaction which took place, allegedly, on October 5, 1931, when there was no Swiss interest relating to this. Swiss law certainly, no matter what else it does, does not go back for the purposes of this Court and cast light on what happened in Germany in 1931 to German nationals, relating to shares of a German corporation.

Mr. Boland: I think that Mr. Burling has misconceived the purpose of the question, Your Honor. The purpose of this question is merely to ask him whether or not he is familiar with the fact that there is a usufruct. We do not want him to interpret this agreement. It is merely as a ground work to get into the general topic of his con-
1637 versation. I will be glad to withdraw the question.

Mr. Burling: I then withdraw my objection. I do not concede that any question of Swiss law is before this Court.

Mr. Boland: I think we can establish that with this witness, Your Honor.

That is a matter of law for this Court to decide; there is a very serious question of Swiss law. The corpus of this gift is located in Switzerland. It is our contention, Your Honor, that under Swiss law a waiver that was valid under the private law of Germany, regardless of the foreign currency regulations, will be recognized and given full faith and credit in Switzerland, that the Supreme Court and the established law of Switzerland will not recognize any foreign currency regulations in Germany, and that is the main purpose of this man's testimony. The corpus of the gift is in Switzerland, and the Swiss law will look only to the private law of Germany by conflicts of law, and if valid under the private law, then they will give full effect to the waiver.

And the position of the United States Government in this particular case is that of taking over the rights of Wilhelm and Martha von Opel, and if Martha and Wilhelm von Opel tried to establish a usufruct after having waived it under Swiss law, they would not be permitted to establish it. It would not recognize any subsequent rights.

Mr. Burling: That is a position which I concede
1638 Mr. Boland has a right to argue at the appropriate time. It is, nevertheless, an argument addressed to Your Honor's knowledge of the law and not this witnes'. Because the question of what foreign law Your Honor will apply is a matter of our domestic law of contracts.

The Court: That is undoubtedly true. But if I did ultimately decide that the law of the jurisdiction where the property is located did control, then I would have to know the Swiss law.

Mr. Burling: I agree with Your Honor.

The Court: I think I will take it, then, and bear in mind your point.

Mr. Burling: By withdrawing my objection, which I do,

I do not wish to concede the point that Swiss law governs.

The Court: Yes, I understand. All right, he wants to save his point to argue that the Swiss law does not apply.

Mr. Boland: We are agreeable to that.

By Mr. Boland:

Q. Are you familiar with the term "niessbrauch"? A. I am familiar with it.

Q. Is there such a term under Swiss law? A. The Swiss code use the term "nutzniessung." That is exactly the same concept as "niessbrauch."

Q. And is there a provision in respect of niessbräuch or nutzniessung under the Swiss code? A. Yes, there
1639 is a section about the niessbrauch in the articles 745 'til 775. They deal with the nutzniessung.

Q. And does that cover the general definition of nutzniessung—niessbrauch? A. There is no explicit definition of nutzniessung in it, but this whole chapter that is in the book on property deals with the nutzniessung, or with the niessbrauch.

Q. Would you explain generally the provisions of those particular sections to which you have referred? A. The nutzniessung, or niessbrauch, is a so-called limited right in rem. That means that the full ownership is split into two rights. The one is the right as to so-called—that the so-called usufructuary has. He has the right to get the interest, fruits, he can administer the thing; if shares are the object of the usufruct, he has also the voting right. And the other right is the so-called nude proprietes, N-U-D-E P-R-O-P-R-I-E-T-E-S.

The nude proprietes belongs to the legal owner. He has the right to control that the usufructuary uses the capital gradually, and he will get back the full ownership if the usufruct comes to an end, because a usufruct can only be made to last for lifetime.

Q. Under the provisions of the Swiss Code, is joint pos-

session necessary in order to establish a valid niessbrauch?

A. In order to establish a valid niessbrauch as a
1640 right in rem, it is necessary to transfer possession to the usufructuary. That is said explicitly in the article 746 of the Swiss civil code.

Q. Doctor, are you familiar with the provisions of the German code in respect of niessbrauch? A. Yes, I know them.

Q. And you have had an opportunity to read them? A. I read them.

Q. And are the provisions under the Swiss code comparable to the provisions under the German code? A. They are comparable but there are some minor differences.

Q. But in general? A. In general they are similar.

Q. So that a Swiss court would have no difficulty in establishing a niessbrauch; for example, let us assume this case, that the donor gives property and passes title to a donee, and the contractual relationship is such that the donor has a right to call upon the donee to establish a usufruct in the future. Assuming that that arrangement, that agreement had been entered into in Germany, and that the corpus of the gift was actually now located in Switzerland, if the donor came and sued to establish his right in Switzerland, there would be no difficulty in establishing the niessbrauch, is that right? A. No difficulty at all.

1641 The Court: What would be the view of the Swiss Court? You say there is no difficulty. Is that because you would follow the law of Germany?

The Witness: No, they would establish a usufruct under Swiss law, naturally, but the claim would be, "Please, Court, order the defendant establish the niessbrauch," and then the court would order the defendant to establish the niessbrauch.

The Court: In other words, you would govern it by the law of your state, but you would take into account the acts that occurred in Germany, together with the demand or act that took place in Switzerland, is that right?

The Witness: Exactly. We would say the contract is governed by German law, but the way, how it has to be performed, is governed by Swiss law.

The Court: All right.

By Mr. Boland:

Q. Doctor, what is necessary under Swiss law to create a usufruct as a right in rem? A. You have to transfer the possession of the thing in which the usufruct shall be created to the usufructuary.

Q. Suppose that the corpus of the gift is in the nature of bearer shares of stock, and that these bearer shares of stock were located in a safe deposit box. What would be required under Swiss law in order to give the usufructuary possession? A. You have to give the
1642 key of the safe deposit box to the usufructuary or to his agent.

Q. Well, suppose for example that there is only one key, and the usufructuary keeps that key? A. The usufructuary keeps the key, that's okay.

Q. He is given the key, right? A. He is given the key; then the usufruct is established, because the usufructuary can take out the shares and exercise all rights of a possessor.

Q. Suppose there are two keys, and the donee keeps one, and the usufructuary gets the other? A. That is still sufficient, because still the usufructuary can exercise his rights.

Q. Suppose there is only one key, and the donee keeps that key? A. That would not be sufficient.

Q. So the main thing is delivery of possession or a substitute for possession? A. That is the delivery of possession.

Q. The delivery of the key is delivery of possession in Swiss law? A. Exactly, yes.

Q. Can delivery be made, Doctor, under Swiss law to an

agent of the usufructuary? A. That can be made.

1643 Q. Can delivery be made to the usufructuary, to a person who is not in fact the agent of the usufructuary? A. He is not the agent?

Q. That's right, not in fact. A. If he is not the agent, and if the usufructuary doesn't ratify later on that he is an agent, there is no transfer of possession.

Q. Assume, Doctor, that it is established in this case that in the year of 1935 the two donors to a gift agreement in Germany, and the donee of the gift agreement under which title is passed to the donee, and in which certain rights in connection with the usufruct are reserved to the donors—we will assume that a usufruct has not in fact been established but that there is a right in the donors to call upon the donee to establish a usufruct.

Now, let us assume further that the corpus of this gift if physically located in Switzerland, and that the parties now agree that all rights retained by the donors would be waived or terminated or made nugatory. Would the Swiss law recognize such a waiver? A. Where was this agreement between these persons made?

Q. The agreement was made in Germany? A. Yes, it would be recognized.

Q. How would a Swiss court handle the situation? A.

1644 They would say that such an agreement was made in Germany and that the rules of German civil law apply, so they would look at this agreement made in Germany, and if there is a valid agreement under German civil law, they would enforce this agreement in Switzerland in saying that the usufruct has been waived.

Q. Let us assume, Doctor, the same case, that under German private law all that is necessary to effect a waiver, to to terminate the rights of the donor, is an oral agreement among the parties that the rights are now out of existence. However, let us assume further that under the foreign currency regulations of Germany that such a waiver is void. Under these assumptions, Doctor, what

effect would a German court give to such a waiver? A. German court?

Q. Swiss court, pardon me. A. The Swiss court would disregard completely the German foreign currency regulations and provisions in these regulations that some agreements are void for lack of license.

Q. You say that the Swiss courts would not recognize the German foreign currency regulations, even though they stated that such an act was void? A. That is exact. There is a very important case that comes near to the assumption you made me, and it is not the only case about the not-recognition of German foreign currency regulation, and that is the decision of the Swiss Federal
1645 Supreme Court, First Civil Bench, of October 8, 1938, and if Mr. Laufer likes, he may check if the translation I made myself is correct. I have different copies of it.

Mr. Boland: I would like to have this identified. I will not offer it until Mr. Laufer has had a chance to check the translation.

(Accordingly, the document above referred to was marked Plaintiff's Exhibit 102 for identification.)

Mr. Boland: I think we can go ahead with this.

Mr. Burling: May we say that if we have any dispute about the translation, we will bring it up later.

Mr. Boland: We will withhold our offer, Mr. Burling, until such time.

By Mr. Boland:

Q. Doctor, you were referring to the Swiss Supreme Court case? A. Yes.

Q. As a justification for the position you have just stated that the Swiss courts would not recognize the for-

eign currency rules of Germany? A. Shall I explain the case?

Q. Yes, would you, please. A. In that case there was an assignment of a claim of German law, and the court held that the assignment in itself was governed by German law. But then it says from the beginning there
1646 is no discussion about the applicability of the rules of the German civil code because the defendant does not deny it. But the defendant opposes to the claim, saying that the assignment was void because there was no license given by the German Devisenbewirtschaftungsstelle.

That was the first position, and the second, that performance of his duty, as referred to previously, had become impossible, and therefore the duty to be performed had been extinguished to this extent under German law.

Q. Did the court state why it did not apply the German foreign currency regulations? A. Then the court said that he does not apply the German law, the German currency regulations, because it is against the Swiss public order.

Q. And does it explain in detail why it is against the Swiss public order? A. The prohibition of payments—on page 3—of payments of the German Foreign Currency law and the other restrictions about claims are interference with creditor rights in order to spoil them, and these prohibitions are contrary to the basic philosophy of the Swiss legal order. From this follows that the German foreign currency regulations cannot be taken into consideration by a Swiss judge either directly in so far as has been the contents of a claim, nor indirectly in so far as they make the performance impossible.
1647 The Federal Court has already decided in this way in a judgment of September 18, 1934, in the case Nathan-Institut c. Schweiz. Bank fur Kapitalanlagen entschieden, and we can refer to the arguments given there.

Q. Doctor, are you familiar with the philosophy of this particular position of the Swiss court? A. I think you ask me why they said that the foreign currency regulations were against the Swiss public order?

Q. Yes. A. After the first World War Swiss banks and Swiss firms had made large investments—

Mr. Burling: I have an objection. I am not contesting Mr. Kaufman's qualifications if he were called as a historian, but I don't believe that the history of Switzerland or the philosophy of the judges is an appropriate topic for expert testimony.

The Court: I guess the Swiss public order is something like our public policy.

Mr. Boland: Yes, Your Honor.

The Court: You are speaking of what the Court has declared, now?

The Witness: Yes. I would like to say just a few words why they say it is against our public policy.

The Court: Have the courts expressed themselves the way you are about to express yourself?

1648 The Witness: What I say the court says here, as I read to you, that the German foreign currency regulations spoils the rights of Swiss creditors.

The Court: I understood that. But you are going to enlarge on it now. And what I wanted to know is where do you get your information, do you get it from your courts, or just your knowledge of the historical facts?

The Witness: No, in this case the judge says that, and the previous case refers to what they say here as it has been discussed in all Swiss newspapers. In the first case there they say why these German foreign currency regulations interfere with the rights of Swiss creditors.

The Court: In other words, what you are about to say you got from the court's decision in another case which referred to the newspaper items, and so forth?

The Witness: Exactly, yes.

The Court: All right, I will permit him to say on.

By Mr. Boland:

Q. What is the general philosophy behind the position that is taken by the Supreme Court in that case, Doctor? A. Before the German foreign currency regulation, Swiss banks and Swiss firms had made investments in Germany, and under these agreements solvent German firms had to pay back these loans in marks or in gold marks or in Swiss francs in Switzerland, place of performance being Switzerland. Now came these German foreign currency regulations and prohibited these German solvent firms to pay back their loans in Switzerland or anywhere outside Germany.

The Germans could just pay inside Germany, and Swiss creditors could not dispose of this money outside Germany.

That is the reason why the Swiss Supreme Court held that these provisions of the German foreign currency regulations spoils the rights of Swiss creditors, and are against the Swiss public policy, or as they say here, the Swiss public order.

Q. Therefore, Doctor, assuming—getting back to our hypothetical question—that the parties to a gift agreement in which the right had been reserved to call upon the son to set up a usufruct in the future, that if the parties had agreed to waiver which was valid under German law, then if the corpus, being physically located in Switzerland, then the courts would enforce the donor's demand against the donee to establish the usufruct? A. The court—not enforce.

Q. Pardon me, not thereafter enforce any right. A. They would not enforce that because waivers and assignments are both verfuegungen, as discussed this morning, and come under the same rule.

Q. Let us assume, Doctor, that in fact in this case a usufruct had been validly established in Switzerland in connection with these shares of stock, and then thereafter the parties agreed to waive under German law, and the waiver being valid under German

law. A. Being valid under German law?

Q. Being valid under German law, German private law, but invalid under the foreign currency regulations; would the Swiss Supreme Court recognize the foreign currency regulations in that instance? A. They would not recognize the foreign currency regulations as they have cited in this case, in a case before, and in a case later. In a later case they make reference even to an American case.

Q. So I understand your testimony to be that whether or not a usufruct has been created, or whether it has not been created, that if the parties waived whatever rights they had, and the waiver being valid under German private law, that the Swiss courts would not recognize any foreign currency regulation of Germany which declared such a waiver void, is that right? A. That is exact.

Q. So that under such an assumption that the waiver has taken place, that the donors of that gift agreement would no longer have any claim recognizable in Switzerland either against the corpus of the gift, is that right that they would have no claim after having waived, they would have no claim or interest in the corpus of the gift located in Switzerland? A. That is exact,

1651 yes.

Would they have any interests in or claim against any rights of the donee to the gift agreement? A. They would have?

Q. Any? A. Rights in?

Mr. Boland: Will you read the question.

(The pending question was read by the reporter.)

The Witness: They would have no rights more against the donee.

By Mr. Boland:

Q. So that assuming the donee in this hypothetical case is Fritz von Opel, and assuming the donors are his mother

and father, your testimony is that after they had waived, that under Swiss law the father and mother would have no claim whatsoever against the son, is that right? A. Undoubtedly.

Q. And assuming that the corpus of the gift consists of shares of stock in Overseas Finance Corporation, the plaintiff in this case, that after such a waiver the donors, the mother and father, would have no claims whatsoever against the corpus of the gift, is that right? A. That's right.

Q. So that there could be no element of control whatsoever from the Swiss standpoint. A. That's
1652 correct.

Mr. Burling: Mr. Boland, if you have finished this topic, if you would make a statement as to what other points of Swiss law you would like to make, I might be willing to stipulate with you, in the interest of expediency.

Mr. Boland: The other topics are with respect to the Liechtensteinian citizenship, and just two or three questions on domicile under Swiss law.

Mr. Burling: All right; I guess you had better proceed.

The Court: Mr. Boland, I do not like to interrupt you here, but I want to see if I have the trend of your reasoning not on this point but antecedent to it. Do you maintain that this act on the part of Wilhelm von Opel and his wife in 1935 amounted to a waiver of a right that already existed, or do you maintain that no right in rem existed, and that after investigation they found it did not exist, and therefore took no action? Or do you claim one or the other, I do not know which?

Mr. Boland: I am anticipating the Government's defense, Your Honor.

The Court: Maybe that is why it has confused me.

Mr. Boland: I think it probably is. Our position is that a gift was entered into on October 5, 1931, and at that time it was the intent of the parties merely to have a right to call upon the son to set up a usufruct.

1653 The Court: That is what I thought it was, and that that never occurred.

Mr. Boland: Was never called upon.

The Court: And therefore no right in rem ever existed.

Mr. Boland: Yes, Your Honor, and that in 1935 the parties decided to waive whatever rights they had under the gift agreement, even this right to call upon the son to set it up in the future. That is what Dr. Gros was testifying to. And the waiver being valid under German law—

The Court: But they could waive that without any consideration by an oral agreement in 1935, and that is what they did.

Mr. Boland: Yes, Your Honor. Dr. Kronstein testified that an oral waiver in such an instance was valid under private law.

The Court: I follow you now. But the point is, your point then is that no right in rem existed, and in addition to that the right to claim a usufruct in the future was waived, is that right?

Mr. Boland: That is right, Your Honor.

The Court: So that in 1935 every vestige of a legal claim ended.

Mr. Boland: Ended. The confusing element was on behalf, when I said whether the usufruct was created or was not created, the Government, I took from the

1654 cross examination of Dr. Gros is maintaining the position that a usufruct had in fact been created.

The Court: Yes, I know that.

Mr. Boland: And I was just bringing out for the Court that even if one had been created, that the waiver would be effective in respect of the created niessbrauch, which would have dissolved it and put you in the same position, there were no enforceable rights.

Mr. Burling: There is an additional element of confusion, if Your Honor please, because the splitting, the fragmentation of the German law which my friend is engaged in between private law and all law; Dr. Kronstein did tes-

tify, but he did also testify that under German law a license in his opinion would be required, and since it was required and not received, it would be void.

Mr. Boland: If a usufruct had in fact been established.

Mr. Burling: Either way, I believe.

Mr. Boland: I don't believe that is true.

The Court: I just wanted to get Mr. Boland's position. I think I have it now.

Mr. Boland: The main point being brought out through this witness is that the Swiss courts do not pay any attention to this.

The Court: I got that point clearly.

Mr. Boland: Which position, I might add, Your
1655 Honor, we will establish at a later date, is consistent with the American position.

By Mr. Boland:

Q. Doctor, I show you now Exhibit 104-A and 103. A. I think you have to show me another one.

Mr. Burling: I object to any testimony being elicited from this gentleman as an expert, because there is no showing that he is any kind of an expert.

Mr. Boland: I am going to qualify him right now. Will you hold your objection until I finish the questions, please.

Mr. Burling: Surely.

By Mr. Boland:

Q. Doctor, are you familiar with the citizenship laws of Liechtenstein? A. I am familiar with it.

Q. Are you familiar with the citizenship laws of Switzerland? A. I am familiar with it.

Q. Have you had during your practice an opportunity to study the Liechtenstein laws in respect to citizenship? A. We had to do with Liechtenstein law in the law office of my father, and there I became first acquainted with Liechtenstein law.

Q. And are the Liechtenstein laws in general the same

and similar to Swiss citizenship laws? A. The Liech-
1656 tenstein citizenship law is similar to the state law of different states of Switzerland.

Mr. Burling: I move to strike that on the ground that this man is not an expert on Liechtenstein law. I too have had occasion to study the law of Liechtenstein with reference to nationality, and I assert that I am—if I were as much an expert on that law as this gentleman, it clearly would not be for me to testify. The coincidence, or accident that Liechtenstein is contiguous to Switzerland does not mean that he can testify as to the laws.

The Court: I think you may be right, but I do not know how far he is going to go.

Mr. Boland: Your Honor, I would like to make just one statement. The Government has called a person by the name of Mr. Pere in New York as an expert in connection with this matter—not in this case but in several instances—and I think that the qualifications of Dr. Kaufman are much better than his.

The Court: You have not finished the qualifications, have you?

Mr. Boland: No, I have not.

The Court: I will take whatever statements he makes, Mr. Burling, subject to objection and motion to strike.

By Mr. Boland:

Q. Doctor, are you familiar with the manner in
1657 which citizenship is granted in Switzerland? A. I am familiar with it.

Q. And are you familiar in detail with the manner in which it is acquired? A. I am familiar with it.

Q. Are you familiar with the manner in which citizenship is acquired in Liechtenstein? A. Yes, I am.

Q. Are you familiar in detail? A. I know it from the law and from what we had in the office of my father.

Q. Have you had any experience with this law? A. As to citizenship?

Q. Yes. A. Liechtenstein, I myself never had a case in Liechtenstein about citizenship, but I know about Liechtenstein citizenship law for the simple fact that most of the lawyers of St. Gallen, where I am living now, are dealing in St. Gallen and in Liechtenstein at the same time, and we discuss Liechtenstein matters as we discuss our own matters of the state of St. Gallen.

Q. Have you made a study of the laws of Liechtenstein in respect of citizenship? A. I made a study of the law of citizenship of Liechtenstein.

1658 Q. Do you have a copy of the laws of Liechtenstein in respect of citizenship here with you today? A. I have it here with me.

Mr. Boland: The testimony which he is going to give, Your Honor, is to bring out to the Court the manner which is set out by statute in which a person becomes a citizen, and the purpose of this testimony is to counteract the inference which has been given to this court by the Government to the effect that Fritz von Opel bought a citizenship with some cloak around the fact that he paid money for it.

It is a fact that under the statute of Liechtenstein that sets up a citizenship a payment is required.

Mr. Burling: I don't think Mr. Boland can testify as an expert, Your Honor.

The Court: I suppose if you want me to judicially notice the laws of the principality, there is some way to bring those to my attention.

Mr. Burling: We have them in a volume, if Your Honor please, why don't we stipulate certain sections of the Liechtenstein code?

The Court: I do not believe we have qualified him as an expert, as I understand it. I have read some of the laws of Maryland, myself—that isn't a good illustration. I have

read some of them over in Virginia myself, but I do not believe I could qualify on it.

1659 I do not think that is the way to do it, I mean, if you are going to ask him anything as to his opinion on a certain state of facts, or some hypothetical question.

Mr. Boland: I will be glad to ask him on the hypothetical—

The Court: I say that is the part that is objectionable.

Mr. Burling: I offer to stipulate any section of the Liechtensteinian nationality code, or whatever the law is called. I do not think we have any dispute.

The Court: I can judicially notice that, I suppose.

Mr. Boland: If we get that in the record, that is the main thing.

Mr. Burling: If you will tell us what sections.

By Mr. Boland:

Q. Read the sections, Doctor; just the section numbers. A. The main sections are section 6, 7, and 10.

Q. Of what statute? A. Of the Liechtensteinisches Landes-Gesetzblatt of January 10, 1934.

Mr. Burling: I do not think the witness is qualified to state that, but since he has, I will offer to stipulate the text of the Liechtenstein code in the sections named by the witness, if you have the text of the code available.

Mr. Boland: I did not get your question, Mr. Burling.

The Court: I will tell you what to do; between

1660 now and the next meeting, you two see if you cannot stipulate on the Liechtenstein code and any pertinent matters as to which I can take judicial notice.

Mr. Burling: I am sure we can, Your Honor.

The Court: If you cannot do that, you had better get some expert.

Mr. Boland: From Liechtenstein?

The Court: I don't know what to tell you to do, but the point of it is I think our rules on expert testimony are

right strict, and I do not believe I could accept him as that. I could on Swiss law.

Mr. Boland: I have some questions on Swiss law which might be related, Your Honor.

Mr. Burling: I object to anything on the Swiss citizenship law, because there is no testimony, whatever, here that in any way—

The Court: Is there any claim that he is a citizen of Switzerland?

Mr. Boland: No. There is, however, it seems to me this that is important to get before the Court: Here is a man who had a permanent residence in Switzerland for quite a period of time. And he ended up by being a Liechtenstein citizen rather than a Swiss citizen.

Through this witness, I think, when he explains what the law is, and the requirements for Swiss citizenship—
1661 that is, a six-year continuous permanent residence is a very difficult thing to acquire.

Mr. Burling: We can save time. I will stipulate that it would have been impossible in 1939 for Fritz von Opel to have become nationalized in Switzerland.

Mr. Boland: Because of the strict residence requirements. We will stipulate what the law is.

Mr. Burling: I think it is enough. The only point of Swiss citizenship, as I understand it, is that he did not become a Swiss national, and I am willing to concede that he could not have under applicable Swiss law. I do not see that we need go any further than that.

The Court: I think that is all you need.

Mr. Boland: There is another phase to this, and I want to say to this Court that with respect to acquiring citizenship in Switzerland a payment is made for the acquisition of citizenship, and that first of all you have to be approved by the community before you are admitted into citizenship of the state of Switzerland, and that the payment of money in respect of acquisition to citizenship is not unusual.

We in America would look with abhorrence upon such a thing, and I think that is the very inference that the Government is trying to create in connection with Fritz von Opel's acquisition of citizenship, that he paid 32,000 Swiss francs.

The Court: That would be admissible as to Liech-
1662 tenstein, but I do not know about Switzerland. We are not concerned with his troubles in Switzerland, are we, about becoming a citizen? I don't understand.

Of course, I do not know what the Government is going to do. You do these a little out of turn. I do not suppose the Government is going to criticize him for not taking up a membership in Switzerland. If he did, I should think it would be going pretty far afield from this case.

Mr. Burling: I certainly am not, Your Honor. I concede he was ineligible for Swiss citizenship under Swiss law; that being so, the issue of Swiss rationality drops out.

Mr. Boland: Will you stipulate, also, that the payments made in connection with the acquisition of citizenship were normal?

Mr. Burling: Certainly not. I think it highly irregular, and I do not believe for a minute in Switzerland they do things like this, but I do not think it is relevant.

The Court: Mr. Burling, you are not going to offer that he made any large payments in Switzerland, are you?

Mr. Burling: No, Your Honor, I am not going to bring up any point that he did in Switzerland with reference to citizenship.

The Court (To Mr. Boland): He said now, and assured me, he is not going to bring up anything whatever so far as Mr. von Opel is concerned in connection with his
1663 activities in Switzerland in trying to become a citizen of Switzerland.

Mr. Boland: Yes, but he is going to bring up the fact that Mr. von Opel made payments in the acquisition of citizenship in Liechtenstein, and by this witness I can show

that in Switzerland it is normal to make such payments, and also that being one of the states adjacent thereto, that it would not be unusual to have payments made there.

The Court: I think that is non sequitur.

Mr. Gallagher: I think we have enough in the record, Your Honor. We have already introduced Dr. Henggeler's testimony, which was stipulated.

The Court: As I understand it, you are offering it to prove that by reason of the fact that it is not wrongful in Switzerland to pay certain monies in order to get citizenship there, why, I could draw the conclusion that that may be the same situation in Liechtenstein, is that right?

Mr. Boland: Yes. I think that, coupled with the statute, would give you a good insight that the inference drawn by the Government is incorrect.

The Court: I do not believe I can permit that. In fact, these are separate countries, are they not? There is no doubt on earth about that.

Mr. Boland: They are, except that Liechtenstein is under the foreign protection of Switzerland.

The Court: Protection, but it does not have any
1664 other connection; it is not a part of it?

Mr. Boland: No; it is an independent principality.

The Court: That is what I thought.

Mr. Gallagher: Your Honor, I think we could probably drop it here, but I would further like to point out to the Court at this time that we submit that neither this Court nor can the Government contend that any court in this country can look behind the act of any sovereign with respect to the granting of citizenship.

The Court: That is another point, later on. I did not understand from the opening statement that his point was that. But I think we get a little bit off of it now. You are trying to establish, as I understand it, by reason of the fact that in an entirely separate country it is all right to pay money, to try to get a citizenship, that I could draw the conclusion that that same situation would obtain in

a neighboring country which is a different one. I do not think that is logical.

Mr. Boland: We are ready to have the witness cross examined.

The Court: I will sustain the objection, if that is all you want.

1665 Mr. Burling: May I cross examine him now?

Mr. Boland: Yes.

Cross Examination

By Mr. Burling:

Q. Did I correctly understand you to say that in connection with the creation of a usufruct in Switzerland, if shares which are the object of the usufruct, if the shares are placed in a box and the key to the box delivered to a third party who is the agent of the usufructuary, and he agrees to hold the key as agent for the usufructuary, that that is valid delivery and brings the usufruct into immediate existence? A. That is it exactly.

Q. Thank you. Now will you explain what you mean by "German private law?" A. When I used the term of "German private law," I referred to the German Code, and to the provisions contained therein.

Q. I see. Now, German law, the concept of German law, would include all the law that was applicable to a situation, would it not, and not just law in a particular book? A. Once more, please.

Q. I say, if you speak of what the German law is—

A. Yes.

1666 Q. —in a given situation— A. Yes.

Q. —would you not have to look to what all the law in Germany is, and not just the law contained in a particular book? A. Oh, sure. The whole law consists of all the law, yes.

Q. Now, first, aside from the consideration of Swiss public policy, which you stated— A. Yes.

Q. If two Germans make a usufructuary transaction in Germany, which later relates to shares situated in Switzerland, is it not true that normally the Swiss court would determine the validity or non-validity of the usufruct by looking to the German law which is applicable? A. You speak about the agreement?

Q. Yes. A. The agreement is governed by German law, yes.

Q. And the construction of the instrument is governed by German law, is it not? A. It is.

Q. And without reference to questions of foreign exchange law, supposing there was a dispute in a Swiss court as to whether a usufructuary had or had not waived his interest, and the waiver agreement took place
1667 in Germany. Then again the Swiss court would look to the German law in determining the meaning of that transaction? Is that not correct? A. Yes.

Q. Is it not the fact that if you have two Germans inside of Germany, and one of them is a usufructuary and the other has naked legal title, which is the literal translation of the word you said was used in Switzerland for the title holder, isn't it? A. Yes; but I wouldn't like to say it is also the same, although I gave it as the term we use, which as you say, is a literal translation.

Q. At any rate, I ask you to assume two Germans are sitting in Germany— A. Yes.

Q. —and one is the usufructuary of shares situated in Zurich, and the other is the title holder— A. Yes.

Q. —and they engage in a transaction which, under German law, is totally void. A. Yes.

Q. Is it your testimony that the Swiss court might nevertheless attach legal significance to it? A. It depends upon why it is void.

Q. I see. But there are circumstances, you say,
1668 in which a transaction which took place in Germany and was totally void under German law, would never-

theless be given legal effect in Switzerland? A. Only in this case, if it is void because of the foreign currency regulations. In all cases, if it is void under the German law, it won't be held void in a Swiss court.

Q. So you will agree, will you not, that the doctrine you are speaking of is a very remarkable exception to the Swiss law? A. The rule that a court will apply this public order is a very basic rule of Swiss law. But I agree with you that it is an exception to the general rule that you may apply foreign law in a court.

Q. At any rate, it is absolutely exceptional, is it not, the doctrine of the case you cited, which is the decision of the Swiss Federal Supreme Court, First Civil Bench, of October 8, 1935? A. I will say so, that every year there are many, many cases where the doctrine of public order—as you say in this country, of public policy—comes up in the court, and there are many, many cases where the court decided to apply Swiss law instead of foreign law, based upon the doctrine of public policy.

Q. But in respect of agreements entered into, or transactions, within Germany, the common rule, you have
1669 said, is that the Swiss court will apply German law? A. Sure.

Q. And the doctrine in this case is the exception to the general rule? A. To the general rule.

Q. And that is based upon Swiss public policy, is it not? A. Yes.

Q. And what is the Swiss public policy? Will you state that again? A. The Swiss public policy, or the doctrine of Swiss public order, is that no Swiss court will ever apply a foreign law that hurts so deeply the feeling of the Judge that he thinks this law is arbitrary and cannot be applied.

Q. Didn't you state the public policy a little differently before? A. I think you can state it in different terms.

Q. Well, I want to know the particular public policy